

THE CAMBRIDGE LAW JOURNAL

VOLUME 9

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EDITED BY

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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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It is regretted that the exigencies of the war have reduced the space available for book reviews and made it necessary to give no more than short notices of some of the works received for review.

LIBERTY AND THE COMMON LAW*

LORD WRIGHT

IN preparing the few and elementary observations which I am about to make to you tonight I have wondered if the title I chose was apt or suitable. The Common Law is generally described as the law of liberty, of freedom and of free peoples. It was a home-made product. In the eighteenth century, foreign lawyers called it an insular and barbarous system; they compared it to their own system of law, developed on the basis of Roman and Civil Law. Many centuries before, and long after Bracton's day, when other civilised European nations 'received' the Roman Law, England held back and stood aloof from the Reception. It must have been a near thing. It seems there could have been a Reception here if the Judges had been ecclesiastics, steeped in the Civil Law. But as it turned out they were laymen, and were content as they travelled the country, and in London as well, to adopt what we now know as the Case System, instead of the rules and categories of the Civil Law. Hence the method of threshing out problems by debate in Court, and later on the basis of written pleadings which we find in the Year Books. For present purposes, all I need observe is that the Civil Lawyer had a different idea of the relation of the state or the monarch to the individual from that of the Common Lawyer. To the Civil or Roman Lawyer, the dominant maxim was '*quod placuit principi legis habet vigorem*'; law was the will of the *princeps*. With this may be compared the rule expressed in Magna Carta in 1215: No freeman, it was there said, was to be taken or imprisoned or exiled or in any way destroyed save by the lawful judgment of his peers and by the law of the land. Whatever the exact application of that phrase in 1215, it became a text for fixing the relations between the subject and the State. Holdsworth quotes from the Year Book of 1441; the law is the highest English inheritance the King hath, for by the law he and all his subjects are ruled. That was the old medieval doctrine that all things are governed by law, either human or divine. That is the old doctrine of the supremacy of the law, which runs through the whole of English history, and which in the seventeenth century won the day against the un-English doctrine of the divine right of Kings and of their autocratic power over the persons and property of their subjects. The more detailed definition of what all that involved took time to work out. I need scarcely refer to the great cases in the eighteenth century in which the Judges asserted the right of subjects to freedom from arbitrary arrest as against the ministers of state and against the validity of a warrant to seize the papers of a person accused of publishing a seditious

* An address to the Cambridge University Law Society delivered March 7th, 1944.

libel; in particular *Leach v. Money* (1765) 19 St. Tr. 1001; *Entick v. Carrington* (1765) 19 St. Tr. 1029; *Wilkes v. Halifax* (1769) 19 St. Tr. 1406. In this connexion may be noted Fox's Libel Act, 1792, which dealt with procedure, but fixed a substantive right to a trial by jury of the main issue in the cases it referred to.

There is a famous prophecy of Burke's. In 1774, in his speech on American Taxation, he said that the distinguishing mark of our constitution is liberty. But he added the pregnant words, 'But the only liberty I mean is liberty connected with order. That not only exists along with order and virtue, it inheres in good and steady government as its substance and vital principle.' In 1775, he made this prophecy, 'As long as you keep the sovereign authority of this country as the sanctuary of liberty, the sacred temple consecrated to our common faith, wherever the chosen race and sons of liberty, they will turn their faces to you. The more they multiply the more friends you will have.' He added that freedom was the security of price of which England had the monopoly. Today, if he were alive, he would be amazed at the realisation of his prophecy. Not only is the Common Law one of the two great systems of law in the world, but England or, shall I say the British Commonwealth of Nations, strong in the virtue and majesty of liberty, has rallied the nations in two great wars to defeat the German aggressor. Let us for a moment compare our position with that of the Nazis. Every person here is amenable to the law, every person is equal before the law. If any person has privileges or immunities, it is because these are given him by the law.

When, however, the supremacy of law is described as an essential of the Common Law idea of liberty what is meant is not merely the unenacted law, which we generally call the Common Law, but the whole body of law, enacted and unenacted. Historians say that in the disputes which culminated in the Civil War, the Common Lawyers were compelled to give up any claim they might have made to be the sole source and repository of law. That was the price of their alliance with Parliament. The Common Lawyers had at times claimed that an Act of Parliament could be declared void on the ground that it violated Common Law principles. That claim had to be abandoned; it could not be maintained even in the attenuated form that an Act of Parliament should be construed so as not to change the Common Law more than seemed to be unavoidable. That principle of construction (if it can be called a principle) is now, I apprehend, discredited. The upshot of the seventeenth century constitutional disputes was in effect to assert the supremacy of Parliament. Parliament could change or abrogate the old Common Law rules if it was minded to do so, and could make new laws. In that sense the supreme law-making body became the Parliament. Thus, under the constitution, the liberty of the subject, his personal and property rights are liable to be affected, or increased, or diminished by Parliament. No one therefore questions that Parliament has these powers. There are no guaranteed

rights under the English system. There is no written constitution and no Courts as its guarantee. Our liberties are at the mercy of Parliament. The only safeguard against abuse by Parliament of its powers is to be found in the democratic principles of free election, free speech, free discussion, freedom of assembly, and the like, in short in the instincts of a free people.

It is said, however, that powers interfering with the personal freedom and property rights of individuals should only be exercised by Parliament in open session, and in accordance with the Parliamentary procedure appointed for the due passing of Acts of Parliament: and that the enforcement of the law and of Acts of Parliament can be effected only under judgments in public and in open Courts presided over by His Majesty's impartial, instructed and independent judges. It is objected that any departure from these principles involves an inroad upon the fundamental principles of the Common Law. The objectors invoked Magna Carta, the Petition of Right, the Bill of Rights and the Act of Settlement—the whole history of the constitution.

In effect, this attack is made on the system of what may be called Administrative Law. That term is often used without any precise definition. Dicey, in his famous book on the Constitution, found the phrase *droit administratif* current in France, and he took it as meaning the law administered in a special Court for the settlement of disputes between Crown Servants and members of the public. This he condemned offhand as inconsistent with his principle that all men are equal before the law. That maxim is true enough, but all the same the law may impose inequalities: it would be true to say that all persons are equally subject to the law, though the law to which some are subject may be different from the law to which others are subject. To take a simple illustration, the powers of arresting without a warrant are different in the case of a police constable and in the case of an ordinary member of the public, or for that matter even a Secretary of State.

My principal object in this paper is to examine the constitutional position of administrative law. I shall use the term in its limited sense as applied to delegated law-making and delegated adjudicatory functions. It is in this sense that I think it is used by Dr. Robson in *Justice and Administrative Law*, published in 1927, and in the recently published works of Dean Landis, '*The Administrative Process*,' and by Sir Cecil Carr in *Administrative Law*. The Dean's book was published in the United States and Sir Cecil's book in this country.

I intend to deal only with the constitutional questions as matters of theory, not with their wisdom or unwisdom as a matter of policy of making use of the system of delegation. We are living, as I speak, in a state of war, and the employment of administrative law in the sense in which I am using it is at present almost universal, though it is not new except in its extent. It was largely adopted in the war of 1914 to 1918. But before that war, and in the interval between it and the present war,

delegation was largely used, though not to the extent to which it has been used during the present war. As an illustration of its use in peace time I may ask any of my audience to look at the volumes of Statutory Rules and Orders for the years, say, from 1925 to 1936 or any of them. The output of these orders exceeds in bulk that of the Acts of Parliament for the corresponding years. This growth of administrative law is not peculiar to this country. In explanation of its growth I may here interpose two extracts from some illuminating observations made by two Chief Justices of the Supreme Court of the United States. The first is from Chief Justice Stone; it occurs in an address which he gave at Harvard in 1937. 'Perhaps the most striking change in the Common Law of [the U.S.] has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of non-judicial officers. The reception by the profession and the Courts of these new administrative agencies has exhibited an interesting parallel towards other forms of external change. These agencies soon became a matter of concern not alone because of their novelty and statutory origin, but because they were brought into the law as a means of law enforcement and as the instruments for providing to a limited extent remedies for its violation, of which the Courts had possessed a virtual monopoly. Under the civil law the rise of a system of administrative law, independently of the Courts, came as a welcome formulation of principles for the guidance of official action where no control existed before. To the Common Law the use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of Courts over officialdom. It was the substitution of new methods of control often crude and imperfect in their beginnings for the controls traditionally exercised by Courts—a substitution made necessary not by want of an applicable law, but because the ever-expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialised experience than any which the Court had provided.' The Chief Justice compared it to the establishment of equity and added that the profession must not approach it with no object except to resist a strange and therefore unwelcome innovation.

The second pronouncement is from an address at the American Bar Association by Chief Justice Hughes in 1931, quoted by Dean Landis, *op. cit.*, p. 135. The Chief Justice, speaking of the growth of administrative law, said, 'A host of controversies as to individual rights are no longer decided in Courts. Administrative authority within a constantly widening sphere of action, and subject only to the limitations of certain broad principles, established particular rules, finds the facts, and decides as to particular rights. . . . We all recognize that this development has been to a great extent a necessary one. . . Experience, expertness and continuity of supervision, which could only be had by administrative agencies in a particular field, have come to be imperatively needed. But

these new methods put us to new tests, and the serious question of the future is whether we have enough of the old spirit which gave us our institutions to save them from being overwhelmed.'

Law and procedure in the United States differ in many respects from ours, and their systems of administrative law have developed in many aspects on different lines from ours. But as general statements, substantially true in respect of both countries, they are both concise and accurate. I shall be able as I go along to elucidate and illustrate more fully what these great Judges have had in mind.

Some questions have been raised as to the relationship of delegated legislation and adjudication to the Common Law rule of law. These are questions which are today extremely important, particularly at a time like the present when every aspect of every man's life is invaded by, and subject to, Government controls, and is subject to what has been called crisis (that is war-time) legislation. But controls are not necessarily imposed by administrative law. There are, however, special reasons which make administrative law the method so largely adopted. This is so pervasive that many have been led to say that there is no such thing as liberty in war time. That is clearly an exaggeration. The fundamental Common Law rights are, except in rare events, little interfered with. In any case it is important to observe that the Common Law rule of law is not infringed by regulations or bureaucratic control so long as it is imposed by law, and as law includes enacted as well as unenacted law and as delegated law-making, if the power is validly exercised, is, subject to certain qualifications, part of the law of the land, the principle of the supremacy of law is not violated. The subject has to obey. In the same way, delegated adjudicatory powers, if validly exercised, have the same effectiveness in determining the rights and property of individuals as the orders of ordinary Courts of Law, though in some respects the machinery of enforcement may be different.

It has, however, been objected that these methods of delegation are inconsistent with the constitutional principles that law should first be made by Parliament, after full and open discussion in public, and then published authoritatively in statutes, whereas in the case of delegated legislation the law may be made by an official in a Government department and issued in the form of Regulations, Rules or Orders, which may not immediately be known even to the parties affected. Again, it is said that the rights of people should be determined by impartial Judges of the land, by judgment proclaimed in open Court after a public hearing according to the rules of English Law. Both these requirements it is said, are necessary safeguards for the rights of a free people and any departure from them is inconsistent with the true principles of democracy, of parliamentary government and of the administration of equal and impartial justice by Judges whose independence was once for all secured by the Act of Settlement. Our own history furnishes examples of Courts other than His Majesty's Courts of Common Law. In earlier days the

Court of Star Chamber was a purely administrative tribunal, its members were almost entirely members of the Privy Council and it had its own procedure, and to a large extent it evolved its own substantive law. Maitland, in an illuminating passage quoted by Carr, *op. cit.*, p. 126, has observed that, while both Chancery and the Star Chamber were dangerous to our liberties, yet it may be that but for them our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down and the way would have been open for Roman jurisprudence and despotism.' This is true enough, but it is clear that the Common Lawyers and Parliament realised the danger of such Courts to the cherished principles of the Common Law, and Holdsworth has pointed out that it is largely through the abolition of the Star Chamber that English Law knows a theory of Ministerial responsibility. But now in modern days for many reasons the old democratic theory that the law can be changed only by Parliament in open session and that legal rights can only be settled by impartial Judges sitting in the established Courts, has had, by force of necessity, to make concessions to the system of delegated law-making and delegated judicial power. Of the fact of such delegation in modern practice there can be no dispute. It used to be said that a war could not be waged by a democracy. Britain and the Commonwealth have conclusively shown the contrary and have done so without abandoning democratic principles, though at some temporary sacrifice of their stringency, and, as we have seen, they have not abandoned the doctrine of the supremacy of law, because administrative regulations and rules are only forms of the enacted law which binds all. And similarly, if Parliament sees fit to create adjudicating tribunals other than the old Courts, it is only exercising the same power which it exercised in establishing the present system under the Judicature Act, though it is true that that system was based on, and had a continuity with, the ancient constitutional Courts. The new adjudicatory bodies are not antagonistic, but complementary, to the older Courts. The delegated rules and orders have statutory force and are, in theory at least, creations of or at least emanations from Parliament. The sovereignty of Parliament is not thereby violated. On ultimate analysis nothing has happened but a change in procedure. Once more the elasticity and adaptiveness of the Common Law have shown themselves. But though the theory of British liberty still remains unaltered, the changes in the procedure of legislating and adjudicating may involve some serious danger to British liberty and its safeguards. When the war is over and when conditions have approached normal again (they will never be the same as in old days), it will be necessary to work out, presumably by experience by trial and error, the true place of delegated law-making and adjudication in the practical life of the working constitution. As I have said, the question is not as to the rule of law, but as to the system and method according to which law is made or enforced.

The two main forms of what have been called delegated power law-

making and adjudication, obviously involve some differences and each presents problems of its own. It will be convenient to consider first delegated powers of adjudication. This delegation, as it is generally called, is more truly described as the creation of a new Court to decide questions of right, which otherwise would have been dealt with by the ordinary courts of law. The powers of these adjudicating bodies, which are sometimes called quasi-judicial, are limited and defined by that which creates them, an Act of Parliament or sections in an Act of Parliament, or sometimes by a Statutory Order or Regulation under delegated legislative authority. The former is the usual method. It is, however, true that in all these cases the word 'delegated' is not strictly appropriate. Parliament has inherent power to create new Courts. The problem has been to integrate these Courts or tribunals or adjudicating bodies with the older Courts. That has been effected, broadly speaking, by treating the new tribunals as subordinate Courts subject to the general jurisdiction of the High Court. If a right of appeal is given in the measure which establishes the jurisdiction, the appeal will go to the appropriate appellate tribunal. If there is no right of appeal given by the constituent measure, the power of the High Court is limited. It can exercise supervision or control only by means of its orders of certiorari, prohibition or mandamus, which are those normally employed to check an excess or defect of jurisdiction, or to remedy some fundamental error in procedure. But the High Court cannot impose its own criteria of procedure or make the administrative tribunal conform to the rules of process or of evidence operative in the High Court. The administrative tribunal is master of its own procedure, except in so far as Parliament in establishing its jurisdiction has expressly provided and except where it departs from what is called natural justice, a term which must be explained shortly.

I may illustrate these rules by some examples of Administrative Law taken from recent numbers of the Law Reports.

Let me begin with an instance of delegated power of adjudication, in the professional, not the administrative, sphere. The Medical Act, 1858, s. 29, gave the General Medical Council power to exercise disciplinary powers over registered medical practitioners and, in particular, power on specified conditions to erase a medical practitioner's name from the register, after due enquiry. This is a very serious disciplinary measure. It was held in *General Medical Council v. Spackman* [1943] A. C. 627, that the Court could set aside the decision of the Council if it had refused to give a hearing to the accused practitioner by way of defence, though the Act provided for no appeal from the decision of the Council. The proceedings in the High Court were by certiorari, a process by which an order of the inferior Court is brought up to the High Court, which can in proper cases quash the order. The Court set aside the order of the Council on the ground that the substantial requirements of justice had been violated because the doctor had not had an opportunity of being heard. The general principle was stated in *Board of Education v. Rice*

[1911] A. C. 179, at p. 182, where the power to adjudicate had been vested in the Board of Education. 'Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds . . . It will, I suppose, usually be of an administrative kind; but sometimes it will involve matters of law as well as matter of fact [as it did in that case] . . . In doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. . . . If the Court is satisfied either that the Board have not acted judicially in the way I have described [that is, observed the elementary principles of justice] or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.' The General Medical Council is not a department of administration but is what is generally described as a domestic forum; though it is master of its own proceedings, and there is no appeal, still there is the inherent power of the Court to intervene where it is necessary. To those conditions stated above may be added bias, corruption, fraud. These objections are not peculiar to quasi-judicial tribunals, but may apply to an ordinary Court. Thus in *Dimes' Case* (1852) 3 H. L. C. 758, a decree of the Lord Chancellor in the court below was set aside by the House of Lords, because the Lord Chancellor had sat without disclosing, what he had forgotten, that he had an interest in the respondent Company. The question of bias under the Medical Acts was discussed in *Leeson v. General Medical Council* (1889) 43 Ch. D. 366. But the most famous case on the duties of an administrative body exercising judicial or quasi-judicial functions is *Local Government Board v. Arlidge* [1915] A. C. 120. The Local Government Board had power, on appeal, to confirm an order of the local authority for the closing of certain houses as unfit for human habitation. In the particular case they had refused the property owner's appeal. The property owner then applied to the High Court for a writ of certiorari to quash the order. Sect. 39 of the empowering Act (Housing, &c. Act, 1909) provides that the procedure on such appeals is to be as the Board determines, but that the Board shall not dismiss an appeal without having first held a further enquiry, which was done. The one important point was that the Court could not go behind the order made by the Board after the public enquiry, and enquire what officials took part in it. The order was that of the Board, not of any official. The Board might invoke its whole internal machinery to act upon the evidence collected. It was also held that the objector could not claim to see a report made to the Board by one of its inspectors. These were matters of the ordinary practice of the Board according to which it was entitled to proceed in making its decision. It was enough if the public enquiry which the Act required was properly held. The Board followed the practice which was its own and was necessary if it was to do its work efficiently. The Board was not bound to treat such a question as if it were a trial in Court. It

could obtain information in any way in which it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. But the Minister might, and indeed must, rely on the assistance of his staff. That was not merely the usual procedure, but was necessary for the efficient performance of his duties.

This decision can be taken, as I think, to be the charter of the administrative court. Indeed, any other view would have destroyed the usefulness or effectiveness of administrative tribunals. The dispute in such cases is not to be regarded as a piece of litigation. The formal proceedings in Courts of law, oral pleadings, examination and cross-examination, the rules of evidence (which England adopted to protect juries from being misled), the whole of the technical or formal procedure may be disregarded, except of course if, or to the extent that, it is required by the empowering Act. There is, of course, the overriding duty to act in good faith and without bias, and to listen fairly to both sides. But that duty is to be fixed by substantial not formal rules. In *Arlidge's Case* the objector complained that he ought to have seen the inspector's report in order to answer or comment on it and that he ought to have a further opportunity of stating his case orally, and doing so before the actual individuals who decided the matter. But the Court held that he had had a fair opportunity of stating his case in accordance with the ordinary practice of the Board, and that the decision was not of any individual officer, but that of the Board using as far as it deemed necessary, its collective expertness and experience on the materials before it, including the evidence and the objector's statement.

I may, however, observe that there may be cases in which Parliament has required that the decision must be the personal decision of the responsible Minister; but these are exceptional.

But some later cases have distinguished in the circumstances of the special case, the decision in *Arlidge's Case*. I cannot here examine the details of these decisions because I am dealing only with broad principles. I may, however, cite as a good example *Errington v. Minister of Health* [1935] 1 K. B. 249, where a clearance order was quashed on certiorari by the High Court. The circumstances were rather complicated, but I think the objection was that, after the fuller enquiry, the Minister or his officials joined in a private inquiry and accepted *ex parte* statements from third parties, without the objector having any chance of dealing with them. This, and some later cases, do not qualify the broad principle, but only its particular applications, which may involve judicial opinions sometimes difficult to harmonize.

These were instances of judicial inquiries of a more or less routine character held by Government Boards or Ministries in which a normal procedure is developed. There are, however, many tribunals of a more specialized character dealing with recurring problems. Such a tribunal is the National Arbitration Tribunal, which deals with disputes between

employers and workmen as to terms of employment or conditions of labour, and so forth. The scope of its jurisdiction is expressed in broad terms. In the *Bolton Corporation Case* [1943] A. C. 166, which was brought to the House of Lords, an order of prohibition had been issued by the Court of Appeal on the basis that the dispute was outside the powers of the Tribunal. But that order was set aside by the House of Lords, and it was held that the dispute fell within the powers of the tribunal. The result depended on determining the joint effect of an Act read along with a statutory order which was a piece of delegated legislation of equal effect, as if it were itself an Act.

I cannot give further instances of specially appointed judicial, or if you like quasi-judicial, functions. The practice was even before the war very widely spread and covered a wide variety of cases. Since the war there has been an enormous expansion. It is clear that the Courts, already occupied with their ordinary work essential to the ordinary life of the people, crime, tort, contract, divorce and all their other functions, would otherwise have simply broken down. They could never have undertaken the burdens. That in itself would be a sufficient justification for administrative tribunals, without indorsing all that Dean Landis says about the ordinary Courts, such as their want of expertness in particular matters of administration, the want of continuity and experience in specialized disputes, and the other qualifications which come to tribunals dealing regularly with technical matters. Questions like railway rates, tariffs, railway regulations, income tax and a host of the like matters (I might add Workmen's Compensation), do not involve the same aptitudes in the tribunals as a question of criminal or tortious responsibility or of liability in contract. The real judicial qualities of impartiality, independence, and of hearing both sides are not the monopoly of the Judges; the English rules of procedure and evidence are not the only methods of ascertaining the truth. The new tribunals adapted their methods to suit the requirements of the problem to be decided. It has been, however, sought in certain cases to combine the merits of expert knowledge with legal methods by having tribunals composed of both legal and lay elements. This method was adopted, for instance, in the Railway and Canal Commission, and there are many other like tribunals.

I have observed that the adjective 'delegated' is not generally apt as applied to these special tribunals. They are established by an *ad hoc* determination by, or under, Parliament. On the whole they have been subject to little adverse criticism. The system must it seems inevitably to some extent continue after the war. They fill a permanent want in the modern enormously complicated system of government. Experience will bring improvements and adjustments where needed.

I pass now to delegated legislative powers. Here again by a sort of analogy may be observed the need of relieving an overworked Parliament and of bringing in the knowledge and experience of experts for dealing with the special problems. Here there is in truth delegation. Parliament

deputes part of its law-making functions to another person or body, though it does retain its power to annul or vary the law made by the delegate, by requiring it to be laid on the tables of the Houses and made subject to review. Mostly this is little more than formal in practice, but it is essential. The maxim, '*delegatus non potest delegare*,' has been invoked, but like most maxims its superficial persuasiveness (if it has any) depends on little more than a verbal jingle. It cannot in any case be applied to Parliament which is supreme and not subject to a legal quibble. Nor is Parliament a delegate. It is the authentic and responsible mouth-piece of the nation. I pass over this archaism, nor do I see why, generally speaking and subject to proper exceptions, there may not be even sub-delegation, that is, the delegated legislative authority may be deemed to have power in certain cases to subdelegate a definite portion of its power. Certainly such a power was not challenged in the last war. But nowadays a prudent draftsman, if the power was intended, will generally include it in express terms and with the proper limitations as was done in the Defence of the Realm Acts.

For purposes of the present war, the principal statute in this connexion is the Emergency Powers (Defence) Act, 1939. The governing provisions of that Act is sect. 1 (1). This provides for the making by His Majesty of such Regulations by Order in Council (to be called Defence Regulations) as appear to him to be necessary or expedient (note that the condition is what *appear* to him, that is, to the Government) and that the test is not that of necessity, but expediency; then come the limiting words 'for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.' These later words are important. These powers are so wide that it is difficult to think of any case during the war to which they may not extend. Later sub-sections contain some important specific additions, which are not to affect the generality of sub-sect. (1). Sub-sect. (3) provides for subdelegation. It is interesting to note that the term 'Regulations' is used of the Orders in Council and the terms, 'Orders,' 'Rules' and 'byelaws' are used of laws made by a subdelegated authority. Then comes an important addition. By sub-sect. (4), a Defence Regulation and any order, rule or byelaw duly made in pursuance of it, shall have effect even though it is inconsistent with any Act or statutory provision. Indeed sect. 1, sub-sect. (2) (d), expressly gives power to a Defence Regulation to provide for amending or suspending or modifying any enactment, which means an enactment passed before the Emergency Powers Defence Act, 1940; see sect. 2 of that Act. There are, however, two important limitations. Sect. 8 of the Act of 1939 provides that every Order in Council containing Defence Regulations shall be laid before Parliament as soon as may be after it is made, and if within twenty-eight days either House resolves that it is to be annulled, it ceases to have effect, except as regards things done or

omitted under it, but without prejudice to the making of a new Order. And the power to make an Order in Council includes a power to vary or revoke the Order. Again sub-sect. (5) of sect. 1 creates a forbidden territory because it excludes from the range of delegated powers power to impose compulsory military service or industrial conscription. Sub-sect. (2) includes express power to enable the Secretary of State to order the detention of persons whose detention appears to him to be expedient in the interests of public safety or defence of the realm. Finally, I may note that the Act is to continue in operation (and consequently all orders, rules, &c., made under it) only until it is declared that the Emergency has come to an end. The Act of 1940, passed in May of that year after Dunkirk, recited that it was necessary to extend the powers under the Act of 1939, and it gave power to the Government to make by Order in Council provision for requiring persons to place themselves, their services and their property at the disposal of His Majesty so far as it may appear to him necessary or expedient for the purposes set out in the Act of 1939.

I have referred in detail to these Acts because no one can understand English Constitutional Law who does not face what they involve. Their significance is not diminished or avoided by observing that they were passed in an emergency, which threatened the whole future existence of the nation, and that they are limited to the period of the emergency. The emergency was the occasion for the exercise of the power. The essential fact is that the power is there and can be exercised by Parliament, and the power to give it resides in Parliament. When we talk of the supremacy of law we must remember what law means. It is the enacted law and law can be enacted, not only by Parliament, but by delegated law-making powers if Parliament so decides. The judges, able, independent and impartial as they are, are bound by their judicial oath to enforce that law. They cannot effectively question the validity of the law if it falls within the scope of the delegated power. The government's power to make Orders further depends on whether it *appears* to them to be necessary or expedient to do so. Their decision is final. Thus the government may obtain from Parliament powers beyond the wildest dreams of Tudor or Stuart monarchs. The most sacred rights of personal freedom may be superseded. When medieval lawyers spoke proudly of the supremacy of law, they did not contemplate such laws as those which are made under the Emergency Acts, and which, indeed, may be made at any time, so far as mere legal theory goes. I repeat there are no guaranteed rights or safeguards. In *R. v. Halliday* [1917] A. C. 260, during the last war, Lord Shaw maintained the view, though he was in a minority of one, that the order there in question was *ultra vires* as being contrary to Magna Carta; but, even if that was so, it was an Act at the best capable of being repealed or modified like any other order. In the Regulation 18B cases, to which I shall refer in a moment, no one ever suggested that the law was *ultra vires*. Indeed, as we have seen, the power was expressly given. The only question debated was what was the

true construction of the actual order. I shall briefly examine the cases dealing with Regulation 18B, which were decided by the House of Lords: *Liversidge v. Anderson* [1942] A. C. 208; *Greene v. Secretary of State* [1942] A. C. 284. In each case the subject complained that he had been arrested without a lawful warrant and was being arbitrarily held in detention without being charged with any offence. The two cases differ only for present purposes in that in one, that of *Greene*, the subject was applying for a writ of *habeas corpus*, in the other (*Liversidge*) he had brought an action for wrongful imprisonment, and the substantial issue was whether his claim disclosed a relevant cause of action against the Secretary of State for his detention under Regulation 18B. The subject failed in both cases.

Regulation 18B had been made under the Emergency Powers (Defence) Act, 1939. Paragraph 1 of the Regulation was in these terms: 'If the Secretary of State has reason to believe any person to be of hostile origin or association, or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.' Lord Atkin, who dissented, said that no one doubted that the Emergency Powers (Defence) Act, 1939, empowered His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question he said was whether by the Regulation His Majesty had done so. This is true and illuminating. His opinion was that he had not done so. The question was whether the Minister 'had reason to believe.' What the Regulation required was a question of fact, whether the Minister had reasonable grounds on which he so believed, and therefore a Court had to be called in to decide as an issue of fact if there were these reasonable grounds; Lord Atkin thought that, in every case of detention under the Regulation, it was for the Court to decide whether the conditions expressed in the Regulation had been complied with by the Minister; he thought that it was the same question as had to be determined where a police constable had to show reasonable grounds for making an arrest without a warrant. The other view was that the Secretary of State, assuming that he acted in good faith, was entitled and bound to exercise his executive discretion to detain (for such it was), if he had what appeared to him in his own mind reasonable grounds, and that it was a matter for him to decide, not for a Court of law. One reason urged for the conclusion that the decision was absolutely left to the Secretary was that, though an advisory committee was appointed under the Regulation to advise him, he was not bound to act on their advice, but had to make up his own mind. It was further emphasized that, for reasons of state secrecy in war, the question whether the Secretary was justified, could not be tried in a Court of law. This, it was held, pointed to the wider interpretation of the power. It was consequently held that the minister was vested with the power which he

claimed. He was trusted with it in the faith that he would use it honestly and in the public interest. That such a power was expedient and indeed necessary in the circumstances of the time cannot be questioned.

I have taken this case as a striking instance of the abandonment of the ordinary Common Law rules which secure personal freedom from arbitrary arrest and detention. Access to the Court was excluded except for the limited purpose of ascertaining what the law meant. I may note, in passing, that Regulation 18B differs completely in its operation from the suspension of the writ of *habeas corpus*, which can be effected only by an Act of Parliament. Regulation 18B makes the detention lawful, and makes the Secretary's order a good return to the writ of *habeas corpus*. The suspension of the writ would render the remedy for the time being unavailable, but the illegality of the detention, if it were illegal, and the consequent liability would remain.

Thus we see that the doctrine of the supremacy of law (that is, whatever law is operative by, or under the authority of, Parliament) left the subject without any legal remedy for his arrest and detention. The Judges were bound to give effect to the law according to what they held was its true construction. The subject was entitled to have access to the Courts to ascertain what powers are given to the Secretary. When that was decided against him, he had no further redress. So great and supreme are the powers of Parliament; the law they made was absolute.

I have chosen this as the extreme instance of what may be involved in the rule of the supremacy of law. There are, however, in the Emergency Powers (Defence) Act, 1939, other very wide powers, for instance, of taking possession or control of property, land, or undertaking, or of searching premises and of suspending the operation of any enactment under Orders in Council made under the Act. We are all familiar with the mass of Regulations and Orders which have been issued to and enforced under them, extending from the control of great financial industrial concerns to fixing the number of pockets permissible in a waistcoat. The Courts cannot go behind them.

The country bears these acts of interference, restriction and control, because they trust the Government to do what is best to save the country. The country feels that it cannot judge what is expedient or necessary, any more than a soldier or a sailor can in actual battle criticise the commands he has to obey. I am not, however, here concerned with the justification of controls as a matter of policy or statesmanship. Controls and regimentation may at any time be enacted by Parliament. When the emergency ends, as we hope it will end in accordance with our desires, the Emergency Powers Acts and the whole fabric of Regulations made under them will disappear, except in so far as they are specifically preserved. For how long or to what extent they will continue is a matter for the future balancing of national interests on the one hand and individual

initiative enterprise and freedom on the other. But the power of Parliament is always there under the constitution.

It is clear that delegated law making will not entirely cease to function any more than it did after the last war and during the years between the wars. The only question is the extent to which it functions. The country does not like it for itself; it likes to see measures debated and decided in Parliament. It accepts administrative law on grounds of necessity and expediency, not of choice. In the same way it prefers to see rights and liabilities adjudicated upon in open Court by His Majesty's Judges, though it cannot deny the value and, indeed, necessity in particular matters of administrative tribunals. It will be for the future to decide this issue on the basis of experience. On that issue in the last resort the people will judge. It is not strictly true to say that our Government is a government by the people of the people for the people. The people cannot govern. Government is something which must be centralized and specialised. But a living, free and instructed democracy, such as ours, can always, at least in the long run, make its voice felt. It is not merely that the people choose who are to be the ministers who govern; it also, at least on big issues, subtly and indirectly makes its desires and purposes known and effective. A government must have regard to them or it cannot continue, but must give place to others.

SOME EARLY CHANCELLORS¹

H. A. HOLLOND

I

CANCELLARII ABROAD

CANCELLI, the diminutive of *cancer*,² means primarily, a lattice or grill,³ and so secondarily, an enclosure bounded by a barrier of that kind, and thirdly, the duties or office carried on in such an enclosure. *Cancellarius* naturally means a person associated with *cancelli*.

In connexion with the law courts of the Roman Empire *cancelli* denoted primarily the partition, latticed so that the enclosed interior should be visible, which separated the official part of the court from that which was open to the public.⁴ The *cancellarii* were at first the doorkeepers,⁵ who controlled communication with the officials inside, and whose good will was therefore important to litigants and was no doubt promoted by gratuities. This strategic position led to a gradual increase in the dignity of the functions which they performed and of their official status.

Imperial constitutions of the 5th century show that by that time *cancellarii* had attained a position of some importance. The brothers⁶ Arcadius, Emperor at Constantinople 395—408, and Honorius, Emperor at Ravenna 395—423, ordered⁷ that a *cancellarius* was to reside for fifty days after the end of his tenure of office in the province⁸ in which he had served, so that anyone who had a cause of complaint against him should have the opportunity of taking proceedings against him.

A later constitution⁹ issued by Honorius and Theodosius II, Emperor at Constantinople 408—450, forbade anyone appointed *judez* of a province to take his own *cancellarius* with him. The *cancellarius* was to be appointed by the central authority, and was to remain available in the province for three years after laying down his office. It is expressly

¹ This article is part of the introduction to a set of tables recording the dates of office of Lord Chancellors and Keepers, Law officers and members of the higher judiciary, which will be published separately.

² According to Lewis and Short's dictionary *cancer* a crab, and *cancer* a lattice, are separate words derived from roots which have similar forms but different meanings, the one 'hard,' the other 'twist.'

³ *Cancellare* probably acquired the meaning to cancel from the practice of drawing criss-cross lines over the words to be annulled. Pliny in his *Natural History*, VIII, 10, described the patterned hide of the elephant as *cancellata cutis*.

⁴ Pauly-Wissowa, *Realencyclopædie*.

⁵ The word *cancellarius* is used in the sense of doorkeeper by the 4th century historian Flavius Vopiscus, in his life of the emperor Carinus (r. 284—5).

⁶ Sons of Theodosius I (d. 395).

⁷ Justinian's Code, I, 51, 3.

⁸ Diocletian (r. 284—305) divided the empire into 13 dioceses, one of which was Italy, which included what is now Switzerland and part of what is now Austria. Each diocese was divided into a varying number of provinces. C. R. L. Fletcher, *The Making of Western Europe* (1912), p. 35.

⁹ Code of Theodosius, I, 34, 3.

mentioned that he is to be available for examination in the event of the *judex* being accused of misconduct.

The title 'Emperor' disappeared in the West when the Gothic king Odoacer deposed the boy Romulus in 476. Theodoric, who killed Odoacer with his own hands in 490, and succeeded him, ruled Italy with the title 'King of the Goths' until 526, acknowledging a theoretical allegiance to the Emperor at Constantinople. He was an enthusiast for Roman traditions and preserved the Roman forms of administration. He had as the head of his civil service (*magister officiorum*) a very remarkable Roman gentleman and scholar, Flavius Magnus Aurelius Cassiodorus Senator, commonly called Cassiodorus.¹⁰ On Theodoric's death Amalasuntha, his daughter by Audefreda, sister of the Frankish king Clovis, became regent on behalf of her young son Athalaric. Cassiodorus became their *praefectus praetorio*, chief minister, and retained office after their deaths¹¹ until the surrender of Ravenna to Justinian's general, Belisarius, in 540. He then retired to a monastery, where he lived to be more than ninety years of age, devoting himself to study. We have a large number of official letters written by him,¹² some of which throw a little light—one wishes it were greater—on the *cancellarii* of his time. They were obviously very lowly in the scale of officialdom compared with the chancellors of England and of France in the middle ages,¹³ but they were of some local consequence, for they held senatorial rank, carrying the title *vir clarissimus*.

The following passage in a letter addressed by Cassiodorus to a *cancellarius* named Joannes is particularly suggestive. *Respice quo nomine nuncuperis. Latere non potest quod inter cancellos egeris. Tenes quippe lucidas fores, claustra patentia . . . et quamvis studiose claudas necesse est ut te cunctis aperiās.* 'Remember your title. What you do within the enclosure of your tribunal (or ? office), *inter cancellos*, cannot be hid. However much you may shut your doors what you do behind them must be open to all.'¹⁴

We have too the text of a circular letter¹⁵ addressed *diversis cancellariis provinciarum singularum* from which it is clear that each province had a *cancellarius* and that he had a dignified position, with important duties to perform. In this letter the appointee is enjoined to go to such

¹⁰ His family, of Syrian origin, was settled at Scyllacium (Squillace) in Brutii, the 'toe' of Italy. His father, the elder Cassiodorus, was an important official under Odoacer, and *praefectus praetorio* under Theodoric. The younger Cassiodorus founded at least one monastery, collected manuscripts, and instructed his monks to copy them. He sketched out the system on which medieval education was afterwards based. C. R. L. Fletcher, *op. cit.*, p. 103; article in the *Encyclopædia Britannica*.

¹¹ Athalaric died in 534, and Amalasuntha was murdered in 535. Gibbon, *Decline and Fall of the Roman Empire*, Bury's edn., IV, 303.

¹² The collection of Cassiodorus' letters is known as the *Variae*, of which there are a great many editions. The modern one is that by Mommsen, in Vol. 12 of the series *Auctores Antiquissimi*, part of the *Monumenta Germaniae Historica*.

A condensed translation was published in 1886 by Thomas Hodgkin, author of *Italy and her Invaders*.

¹³ As Hodgkin remarks in a comment in Letters, XI, 6.

¹⁴ Book II, Letter 6.

¹⁵ Book XII, Letter 1.

and such a province *cancellorum pompa decoratus et gloriosa gravitate praecinctus*. The following sentences indicate that in some respects he was to be the mouthpiece of royal equity, and that he had authority equal to if not greater than that of the *judices*. *Fasces tibi iudicium parent et dum iussa praetorianae sedis portare crederis ipsam quodammodo potestatem reverendus assumis*. He is warned to eschew the temptation to enrich himself: *reginam illam procacium vitiorum avaritiam fuge*: and he is urged to be the protector of the oppressed: *persona tua refugium sit oppresso, infirmi defensio, praesidium aliqua calamitate concluso, sic enim proprie nostros cancellos agitis si laesorum impia claustra solvatis*.¹⁶

We now come to the Salian Franks, so-called because their home of origin was on the Isala, or Yssel, whose code of laws, commonly called the Salic Law, dates from about 500. We have seen that their king, Clovis (r. 481—511), who conquered a large part of Gaul, and founded the Merovingian¹⁷ dynasty, gave his sister in marriage to Theodoric.¹⁸ It is a pleasant thought that we have a letter, written by Cassiodorus, in his most florid style, on behalf of Theodoric to the philosopher Boëthius, asking the latter to find a good harper for Clovis.¹⁹

The word *cancellarius* was known to the Merovingian kings. But it was used to denote humble officials. The chief minister bore the title *referendarius* and he had under him a staff of *scriptores*, *notarii*, and *cancellarii*.²⁰

By the middle of the 8th century the *referendarii* who had been laymen, had disappeared, and had been superseded by chief ministers who were ecclesiastics and bore the title *cancellarius* or *archicancellarius*. Ducange²¹ gives a list of the *cancellarii* in France, from the time of the Carolingians, whose dynasty started in 751 with Pepin,²² son of Charles Martel and father of Charlemagne. The most interesting name among these early Chancellors is that under the year 752 of the Englishman Boniface,

¹⁶ The last sentence means, I think, 'For one of the proper duties of the office which we entrust to you is to release injured persons from imprisonment in which they have been unjustly confined.'

¹⁷ The name 'Merovingian' is taken from Merovech, king of the Salian Franks 457—481, father of Childeric I, and grandfather of Clovis. *Enc. Brit.*

¹⁸ Gibbon, *op. cit.*, IV, 301.

¹⁹ W. P. Ker, *The Dark Ages*, 117.

Boëthius stands in history in a relation to Theodoric similar to that of Sir Thomas More to our Henry VIII, in that he was the close friend of his master and was judicially executed by him. Boëthius wrote his *De consolacione philosophiae* while in prison in Pavia awaiting execution. The story is told by Hodgkin in his *Theodoric the Goth*, in the 'Heroes of the Nations' series.

²⁰ Stubbs, *Const. Hist.*, I, 352. The *referendarius* had the custody of the *annulus regius*, the royal signet ring, as did the later *cancellarii*. Ducange, *Glossarium*, Vol. I, *S. V. annulus*.

See also Esmein, *Histoire de droit français*, 8th edn., 65.

There was in the late Roman Empire an official bearing the title *referendarius*. He was the confidential legal secretary to the emperor for the purpose of appeals reserved for the latter's personal consideration. See references in Pauly-Wissowa, *Realencyclopädie*; also Hodgkin, *Theodoric the Goth*, 268.

²¹ *Glossarium, S. V. cancellarius*.

²² His ancestors had been hereditary Mayors of the Palace, wielding the real power. He deposed Childeric III, the last of the Merovingian puppet kings.

Archbishop of Mainz, who was soon afterwards Martyr and Saint,²³ for in 754 he went on a missionary expedition to Frisia, now part of Holland, and was massacred there.

Under the chancellor a number of deacons and sub-deacons were employed, as clerks and notaries, being attached to the royal chapel as court chaplains.²⁴

Hincmar, an important 9th century ecclesiastic and annalist, Archbishop of Rheims (845—82) during the reigns of six of the descendants of Charlemagne,²⁵ wrote at the very end of his life, at the request of some of the magnates, an account of palace organization, as he had known it, for the benefit of the young king Carloman. In it he says that the *capellanus* (chaplain), whose earlier title was *apocrisarius*, had charge of all the clerks of the palace, and that with him was associated the *summus cancellarius* who used to be called a *secretis*, and that the latter had a number of able and loyal subordinates *qui praecepta regia . . . scriberent et secreta illis (? illius) fideliter custodirent*.²⁶

We are told by Charles Homer Haskins,²⁷ the leading modern authority on Norman institutions, that there is no positive evidence of the existence of a chancery in Normandy before the conquest. Mention of the title *cancellarius* has survived only in two charters of Duke Richard II (r. 996—1026). We know the names of several of William's chaplains before the Conquest, but very little about their secular duties. Haskins' conclusion on the whole, is that a chancery was lacking in Normandy, in fact as well as in name before 1066. After the Conquest the existence of a chancery is well established. The influence of English tradition may fairly be inferred. For as has been emphasized in Professor Stenton's brilliant book recently published,²⁸ it is a mistake to suppose that the Normans were cultured missionaries. Anglo-Saxon England had been, at various times in its five centuries, in the vanguard of European civilization.

II

SOME ENGLISH CHANCELLORS BEFORE 1660

The old English kings, though there is no evidence of their using the expression 'chancery,' must have had an organization such as that expression denotes.²⁹ For, as W. H. Stevenson wrote:³⁰ 'it is only by

²³ His Anglo-Saxon name was Winfrith.

²⁴ 'Chapel, *capella*, was originally the name given to the places where the *cappa* (cloak) of St. Martin of Tours was preserved with other treasures, and chaplains were the guardians of these relics.' G. Seeliger in *Camb. Med. Hist.*, II, 662.

²⁵ They are the following. The relationship of each to Louis the Pious, Charlemagne's son, is stated in brackets. Lothair I (r. 840—'55, son), Lothair II (r. '55—69, *gs*), Charles the Bald (r. '69—77, son), Louis the Stammerer (r. '77—79, *gs*), Louis III (r. '79—82, *ggs*), Carloman (r. '82—84, *ggs*).

²⁶ The whole passage is in cap. XVI of the *De ordine palatii*; Migne, *Patrologia Latina*, Vol. CXXV, p. 999.

²⁷ *Norman Institutions*, 1918, pp. 52—3.

²⁸ *Anglo-Saxon England*, publ. 1943.

²⁹ Haskins the following references to passages giving information about the Anglo-Saxon chancery—Davis, *Regesta Willelmi*, pp. xi—xv; Hubert Hall, *Studies in English Official Historical Documents*, pp. 163 ff.

³⁰ *English Historical Review*, XI, 731—2.

the supposition of the existence of a trained and organized body of royal clerks corresponding to the chancery of the continent that we can account for the highly technical way in which an Old-English charter is drawn up. From at least the time of Aethelstan (r. 925—39) these royal clerks possessed an elaborate system of *formulae*, slightly more elastic, it may be, than that of the Frankish chancery, but still a system that argues the presence of specially trained clerks. It is difficult to see in what way the *scriptorium* of an Old-English king was inferior to the chancery of a Norman king. Even if judged solely by the amount of the remains of its work that have come down to us, it does not come badly out of the comparison. If we put aside the Domesday Survey it is questionable whether we have so many products, either in an original form or in later copies, of the chanceries of the Norman kings, as we have of the *scriptoria* of Aethelstan (r. 925—39), Edmund (r. 939—46), Edgar (r. 959—75), and Aethelred (r. 979—1016).'

As to the title *cancellarius*, claim has been made to it on behalf of one Regenbaldus, in respect of the last four years of Edward the Confessor, but that claim has recently been challenged.³¹ The first certain attribution of the title is to William's Norman chaplain, Herfast, who was chancellor from 1068 until he became Bishop of Elmham in 1070.

The only notable holder of the office under the first four Norman kings is Roger le Poer of Caen, Bishop of Salisbury, 1107—39, who earned distinction not by his short tenure of the chancellorship from 1101—2, for it was then a comparatively minor office, but by his abiding work as Henry I's chief minister, when he combined the offices of Treasurer and Justiciar. For he laid the foundations both of the financial and of the judicial systems of later times. His Exchequer, *scaccarium*,³² consisted of a group of barons who at Lady Day and Michaelmas held an audit of the sheriffs' accounts, which was recorded in the *rotulus de thesauro* later called the *magnus rotulus pipae*. One of Roger's Pipe Rolls survives, that for the financial year ended Michaelmas, 1130. In the judicial field he surrounded himself with a group of assistant justiciars, some of them barons, others new men like himself. It was their function primarily to hear causes in which the King's interest was concerned, pleas of the Crown, and for this purpose they were intermittently sent on circuit round the shires. But in addition their reputation led great men to pay heavily for the privilege of litigating before them.³³ Roger survived his master by four years.

The appointment by Henry II, on his accession in 1154, of the brilliant and highly trained young cleric Thomas Becket to the chancellorship

³¹ Miss F. E. Harmer, *Bulletin of the John Rylands Library*, XII, Oct. 1938, 5—6.

³² The words *scacci*, chess-men, and *scaccarium*, chess-board, are derived from the Persian *Shah*. The finance committee of the Curia Regis was called *scaccarium* because it sat at a table which was covered with a cloth squared so as to have some resemblance to a chess-board. For the system of reckoning was an adaptation of the *abacus* method of working sums which had recently come into vogue in Germany and France at the schools of Liège and Laon. W. J. Corbett in *Camb. Medieval Hist.*, V, 533.

³³ W. J. Corbett in *Camb. Med. Hist.*, V, 533—4.

marks a new stage in the development of the office. Becket had a staff of fifty-two clerks, each of the various grades among them having an established routine of duties.³⁴ He insisted on resigning the chancellorship when the reluctantly accepted the archbishopric of Canterbury in 1162.

The other notable chancellors appointed in the 12th century were William Longchamp and Hubert Walter.

William Longchamp, Bishop of Ely (1189—97), was a devoted servant of Richard I, who appointed him chancellor in 1189 and concurrently justiciar in 1190. His arrogance and extravagance during Richard's crusade made him many enemies with the result that he was deposed by a Great Council in 1192. The offices of justiciar and chancellor were never again combined. Longchamp deserves mention as a legal writer, for he was the author of a procedural manual.³⁵

Hubert Walter, Archbishop of Canterbury (1189—1205), had been trained in the household of Henry II's great Justiciar, Ranulf Glanvil, being a nephew of Glanvil's wife.

He was employed in important business by Henry II and by Richard, whom he accompanied to Palestine. He returned to England in 1193 to collect the King's ransom, and became justiciar at the end of the year. He was therefore responsible for the important *capitula itineris* issued to the justices who were sent on circuit in September, 1194. Among those *capitula* is the instruction, notable in the history of the coroner, that in each county there should be elected three knights and one cleric as *custodes placitorum coronae*.

Hubert resigned the justiciarship in 1198 in deference to the objections which Innocent III, who became Pope in that year, raised to the tenure of secular offices by laymen. He then joined Richard in Normandy; on the death of the latter he crowned John, and accepted the office of chancellor, which he held till his death in 1205.³⁶

One of the results of the troubles of Henry III's reign was that the Justiciarship ceased to exist as the chief executive office of the Kingdom. From 1234, when Stephen Segrave was disgraced and dismissed, until 1258, the justiciarship was in abeyance. The title was then revived and borne by Hugh Bigot, Hugh le Despenser and Philip Basset, whose names as Maitland wrote, 'represent the alternating fortunes of contending factions.'³⁷ In 1268 Robert de Brus, afterwards competitor for the crown of Scotland, was appointed 'chief justiciar to hold pleas before the King.' The addition of the last six words indicated that his appointment

³⁴ See Dr. B. Wilkinson, *The Chancery under Edward III*, pp. 2—3. He cites Delisle's *Recueil des Actes de Henri II*, Paris, 1919. There is a bibliography of the literature of the early history of the Chancery in *Handbook of British Chronology*, p. 65.

³⁵ P. & M. I, 121; Vinogradoff, *Roman Law in Medieval Europe*, 100.

³⁶ Maitland wrote of the *Tractatus de Legibus Angliæ*, commonly known as *Glanvil*: — 'We should not be surprised if it were the work of Glanvil's kinsman and secretary, Hubert Walter,' P. & M. I, 164. This statement expressed in the form of a guess must not be magnified into an opinion.

³⁷ P. & M. I, 204.

was for judicial purposes only. This development left the Chancellor in possession of the field as the most powerful minister of the Crown. And the first Chancellor of the new reign was a man well qualified to make the most of his position.

Robert Burnell was, during Henry III's life, secretary to Prince Edward, but did not accompany him to Palestine. He became, on Henry's death, one of the three regents, and on Edward's return in 1274, Chancellor. He held that office and the bishopric of Bath and Wells until his death in 1292. In the article on him in the *Dictionary of National Biography*, Tout wrote that it is impossible to determine his share in the far-reaching legislation of Edward I, but the fact that all the important statutes lie between 1275 and 1290 suggests that he deserves to share the credit for them. In 1280 the Chancery, which used to follow the King, was temporarily fixed by Burnell in London. In 1283 he entertained King and Parliament at Acton Burnell. In 1285 he presided over the Parliament which passed the Statute of Westminster II. In 1290 he presided over the commission which reported on the judicial scandals. At Wells he built the episcopal hall. He was noted for acquisitiveness, licentiousness and nepotism. But his kindness and statesmanlike qualities were such that the monk of Worcester wrote that his peer would not be found in those days.

In the 14th century the Great Seal was generally held by an Archbishop or Bishop, but for about twelve years in all it was held by a layman. In 1340 in a fit of anti-clerical irritation due to the alleged failure of his Chancellor, Archbishop John Stratford, to organize supplies for war, Edward III made the curious experiment of appointing a soldier, Sir Robert Bouchier, as Lord Chancellor. It was naturally a failure and lasted eight months only. The next appointment, that of Sir Robert Parving, gave unqualified satisfaction. He was an eminent lawyer, and had been C.J.K.B. before becoming Treasurer. He maintained close contact with the common law Courts, for it appears from the Year Books that he was in the habit of sitting in the Common Pleas from time to time. Coke writes that 'this man knowing that he that knew not the common law could never judge in Equity (which is a just correction of law in some cases), did usually sit in the Court of Common Pleas (which is the lock and key of the Common Law) and heard matters in law there debated and many times would argue himself, as in the Report, 17 Edw. III, it appears.'³⁸ Maitland learned from his study of contemporary editions of the Register of Original Writs that Parving was the only Chancellor whose name appears prominently in the register, 'A considerable number of specially worded writs bear the name of Parving'^{38a}—a number out of all proportion to the brief two years during which that famous common lawyer held the Great Seal. He had the good fortune, we may suppose,

³⁸ Fourth Institute, 79, quoted by Campbell, I, 212.

^{38a} Until recently the accepted version of this Chancellor's name was Parning.

to have some industrious clerk for an admirer, his predecessors and successors were less lucky.'³⁹ Parving died unexpectedly in 1343.

The other lay holders of the Great Seal were Sir Robert Sadington (1343—45) *ex-C.B.*, Sir Robert Thorpe (1371—72) *ex-C.J.C.P.*, Sir John Knyvet (1372—77) *ex-C.J.K.B.*, Lord Scrope (1378—80 and 1381—82), and John Searle (1399—1401). Scrope was a soldier, son of Sir Henry le Scrope C.B. and nephew of Sir Geoffrey le Scrope C.J.K.B. Searle was an undistinguished Master of the Rolls, entrusted with the Great Seal during the revolution.

In the 15th century all the holders of the Great Seal were ecclesiastics, and whose contributions to Equity, though collectively large, cannot be assigned to individuals.

The 16th century tells a very different story. Cardinal Wolsey (L.C. 1515—29), with all his manifold preoccupations, took his judicial duties very seriously. It was a time when the need was widely felt for some tempering of the rigour of the common law. It was in 1523 that Christopher St. Germain,⁴⁰ a most scholarly lawyer, published his dialogue entitled *Doctor and Student*, which had an enormous vogue, running as it did into thirty editions, the last in 1815. In it he defined 'equity,' which had evidently become a well-recognized expression, as follows:—

'Equity is a righteousness that considereth all the particular circumstances of the deed . . . and it is called also by some men *epieikeia*; the which is no other thing but an exception of the law of God, or of the law of reason, from the general rules of the law of man, when they by reason of their generality would in any particular case judge against the law of God or the law of reason—the which exception is secretly understood in every general rule of general positive law.'

Wolsey's conception of his office was inspired by the same idea. His biographer⁴¹ quotes him as saying:—

'It is proper to have a respect to conscience before the rigour of the Common Law, for *laus est facere quod decet non quod licet*. The king ought of his royal dignity and prerogative to mitigate the rigour of the law where conscience has the most force; therefore, in his royal place of equal justice he hath constituted a Chancellor, an officer to execute justice with clemency, where conscience is opposed to the rigour of the law. And therefore the Court of Chancery hath been heretofore commonly called the Court of Conscience, because it hath jurisdiction to command the high ministers of the Common Law to spare execution and judgement, where conscience hath most effect.'

³⁹ The History of the Register of Original Writs, *Harvard Law Review*, Oct. 15, 1889, reprinted in *Collected Papers*, II, 110.

⁴⁰ See Winfield, *Chief Sources*, pp. 321—324; *H.E.L.* V, 266—274. An anonymous serjeant-at-law wrote a replication to *Doctor and Student*.

⁴¹ George Cavendish (1500—61) who was Wolsey's usher and wrote his life, not published till 1641. See p. 283. There is a modern biography of Wolsey by A. F. Pollard.

Wolsey's alleged misuse of injunctions was the subject of one of the articles of the impeachment which his timely death evaded.

The next Chancellor was Sir Thomas More⁴² (1529—32), a common lawyer, and the son of a common law Judge, who survived his son's appointment by a year. More, like Bacon, belongs to the ages and to Western civilization as a whole. This can be said of no other English lawyer except Jeremy Bentham, and he never practised. More's *Utopia* is a name to numbers who have not read it, and many revere his saintliness who are not familiar with his career. It is curious that an appointment so suitable and so universally approved by public opinion should have been made by a king who was so soon afterwards to embark upon a course contemptuous of all law—human and divine.

More set himself to repair the breach which had been made in the relations between the Chancery and the common law Courts. He furthered his purpose by the time-honoured English expedient of asking the Judges to dinner and discussing cases with them round the table. He appears to have attempted, like the great Chief Justice, Lord Mansfield, two hundred years later, to induce in the Judges a more progressive attitude towards the development of the common law, for he advised them to admit equitable considerations and thus make recourse to Chancery unnecessary. But professional tradition was too strong for such a solution.

More resigned in May, 1532, being still on excellent terms with the King, but foreseeing that the trend of events in regard to the matrimonial plans of the latter would inevitably produce a breach. This occurred in due course. More refused to take the oath which was made obligatory by the statute which settled the succession on the King's issue by Anne Boleyn, was attainted in 1534, tried on a charge of high treason in June, 1535, and beheaded in July.

Thomas Audley, *cr.* Lord Audley of Walden, Chancellor 1533 to 1544,⁴³ founded Magdalene College, built the church at Saffron Walden, and acquired the lands of the abbey there, the site of Audley End. He presided at the trials of More and Fisher, directed the proceedings at the trial of Anne Boleyn, brought in the bill for the dissolution of Henry's marriage with Anne of Cleves, and the bill for the attainder of Catherine Howard.

On Audley's death in 1544 Wriothesley was appointed, followed by Rich in 1547. Between 1552 and 1568 there were three episcopal Chancellors, Goodrich, Gardiner and Heath, the last of their like except for Bishop Williams.

From the beginning of Elizabeth's reign in 1558 the Great Seal was held for twenty years by Sir Nicholas Bacon, who received it, as Lord Keeper, at the age of forty-eight. He was the son of a Suffolk gentleman, was educated at Corpus Christi College, Cambridge, and at Gray's Inn, and was appointed as a young man to the post of Solicitor to the Court

⁴² There is an excellent modern life of Sir Thomas More, by R. W. Chambers, published in 1935.

⁴³ He had been Keeper of the Seal from May 20, 1532.

of Augmentations, a board established for managing the property which came to the Crown on the dissolution of the monasteries. He acquired his share of such lands in Suffolk and elsewhere, but he deserves credit for a proposal for the foundation of a University in London, to be endowed from the spoils of the monasteries.⁴⁴

On previous occasions the Great Seal had from time to time been held for a short time by a Keeper who was not Lord Chancellor, but Sir Nicholas was the first to hold it for a long tenure,⁴⁵ with the title Lord Keeper. The reason seems to have been Elizabeth's dislike of conferring honours on her servants. The Seal was delivered to him as Keeper, with all the powers belonging to a Lord Chancellor, but doubts having been raised as to the validity of this procedure a patent was issued giving him the same powers in all respects as if he were Chancellor, and ratifying all that he had done as Lord Keeper. His authority being, however, still questioned, an Act of Parliament was passed in 1563 (5 Eliz. c. 18), declaring that—

‘The common law of this realm is, and always was, and ought to be taken, that the Keeper of the Great Seal of England for the time being hath always had, used, and executed, and of right ought to have, use, and execute, and from henceforth may have, perceive, take, use, and execute, as of right belonging to the office of the Keeper of the Great Seal of England for the time being, the same and the like place, authority, pre-eminence, jurisdiction, execution of laws, and all other customs, commodities, and advantages as the Lord Chancellor of England for the time being lawfully used, had and ought to have, use, and execute, as of right belonging to the office of the Lord Chancellor of England for the time being, to all intents, constructions, and purposes as if the same Keeper of the Great Seal for the time being were Lord Chancellor of England.’

The alternative status of Lord Chancellor or Lord Keeper, and the alternative status of peer or commoner, were not interdependent. Some Lord Keepers were peers, some Lord Chancellors were commoners. A Lord Chancellor or Lord Keeper, whether peer or commoner, presides over the House of Lords, sitting on the woolsack, which is not within the precincts of the House. If he is a peer he can join in the debate, leaving the woolsack and standing in front of the highest seat on the Duke's bench, which belongs to him by virtue of the precedence conferred on him by statute.⁴⁶ But if he is a commoner he has neither deliberative voice nor vote, he can only put the question and communicate the resolutions of the House. Sir Robert Henley, who held the Great Seal as a commoner from 1757 until 1760, when he was raised to the peerage, used, wrote Lord Campbell,⁴⁷ to complain bitterly of being obliged to

⁴⁴ Ultimately it was another lawyer, Henry Brougham, in due course Lord Chancellor, who had a large part in the foundation of the University of London.

⁴⁵ In early times there had often been a Chancellor and a Keeper of the Great Seal at the same time. Campbell, II, 220.

⁴⁶ In practice he is generally the Leader of the Government in the House of Lords.

⁴⁷ *Lives*, 5th ed. I, 15.

put the question for the reversal of his own decrees, without being permitted to say a word in support of them. Henley was the last of the Lord Keepers.

Sir Nicholas Bacon married as his second wife Ann Cooke, sister of the second wife of his friend William Cecil, Lord Burghley. The marriage produced in 1561, when Sir Nicholas was fifty years of age, the gifted Francis.

During the seventeen years that followed Sir Nicholas' death the Great Seal was held successively by Bromley, Hatton and Puckering. Sir Thomas Bromley, L.C. 1579—87, presided over the commission, appointed under statutory authority, to enquire into the charges against Mary Queen of Scots. Her trial took place at Fotheringay Castle, in Northamptonshire, in October, 1586, six months before Bromley's death. Sir Christopher Hatton, who succeeded him as Lord Chancellor, is mainly remembered for the ardent friendship which existed between him and the Queen for more than twenty-five years, and for his accomplished dancing. But he was undoubtedly a man of great ability as well as tact. He died in 1591, when little over fifty years of age. After retaining the seal for some months Elizabeth gave it to Serjeant John Puckering, whom she knighted and appointed Lord Keeper. He was a learned and industrious lawyer, but otherwise undistinguished.

On Puckering's death in 1596 Elizabeth promoted her Master of the Rolls, Sir Thomas Egerton, a very great man in the opinion both of his contemporaries and of posterity. He held the seal until within a month of his death in 1617. He was Lord Keeper until he was appointed Lord Chancellor by James I in 1603 and raised to the peerage as Lord Ellesmere. He is always known by that title, though he was created Viscount Brackley shortly before his death.

In 1616 when he was over seventy-five years old, he was involved in an acute controversy with the most eminent of Chief Justices, Sir Edward Coke, who presided over the Common Pleas from 1606 to 1613, and the King's Bench from 1613 to 1616. Coke challenged the claim of the Chancellor to restrain by injunction a plaintiff who had obtained judgment in a Court of common law from enforcing that judgment against a defendant who had a defence which though not legally valid was, in the Chancellor's opinion, equitable. James I issued an order, which remained permanently in force in spite of subsequent attempts to modify its effect, affirming the authority of the Court of Chancery in this respect.

Coke's intransigence in another matter affecting the royal prerogative led to his dismissal in November, 1616. He died in 1634, after rendering great service in the House of Commons to the Parliamentary cause.⁴⁸

⁴⁸ The male lines of descent from Coke and Ellesmere became extinct in the 18th and 19th centuries respectively.

In the case of both families the husband of a female descendant assumed the family name. The descent of the present Earl of Leicester (family name Coke) and of the present Earl of Ellesmere (family name Egerton) from Sir Edward and Sir Thomas respectively is, therefore, through a female.

Ellesmere's successor has been known as Francis Bacon throughout the intellectual world for so long that his titles Lord Verulam and Viscount St. Albans are seldom remembered. His abilities were so versatile and of so high an order as to merit perhaps the term genius. He was a master of English prose and a consummate orator, a considerable philosopher who shares with Descartes the credit for discovering and stating the nature and principles of inductive proof,⁴⁹ and a seer who visualised the part which experiment and observation would play in the science of the future. For many years he was prominent in affairs of state. He ministered not a little to his keen æsthetic sense by garden planning, lavish interior decoration, and the production of masques. Unfortunately he was also, probably of necessity, a courtier, scheming for wealth and power, and not morally superior to his contemporaries in his methods of acquiring them.

It is surprising that such a man should have found time to achieve the highest success in legal practice; it is not surprising that he should have been far ahead of his time in legal vision.⁵⁰

On Bacon's fall in 1621 James I sardonically turned to the Church, and John Williams, Bishop of Lincoln, became Lord Keeper, and the last ecclesiastical holder of the Seal.⁵¹ He was superseded in 1625 on the accession of Charles I, who appointed Sir Thomas Coventry Lord Keeper, and created him Lord Coventry in 1628. The latter, during his tenure which ended with his death in 1640, followed the example of Ellesmere and Bacon in promulgating a series of orders for the regulation of the procedure of the Court of Chancery. Some of these orders were still in operation in the first half of the 19th century.⁵²

Charles I's last three Lord Keepers, Finch, Littleton and Lane are not now remembered, but two of them bore famous names. John Finch, about whom some facts are recorded below, was first cousin of the father of the great Lord Chancellor, the Earl of Nottingham. Edward Littleton was a descendant of the third son of the eminent 15th century Judge, Sir Thomas Littleton, author of *The Tenures*. The Lord Keeper was created Lord Littleton of Mounslow, but left no son.

⁴⁹ I owe this statement to Professor Broad's Bacon tercentenary lecture, 1926, p. 63. Professor Broad points out that Bacon was incompetent as an actual experimenter and also in mathematics. Upon the question how far Bacon affected scientific development he writes, p. 62: 'So far as I can see, the actual course which science has taken, even if it has been in accord with Bacon's principles and has led to the results which he desired and anticipated, has been influenced little if at all by his writings. I suspect that the popularity of the opposite view is due to the magnificent advertisement which Bacon received from D'Alembert and the French Encyclopædists who found it convenient to march into battle under his ensign.'

⁵⁰ See Holdsworth's appreciation in *Some Makers of English Law*, 105—109, and in *H.E.L.* V, 246—250.

There are two modern popular accounts of Bacon's career, *Francis Bacon*, by Mary Sturt, 1932, and *Bacon*, by Charles Williams, 1933. The classic authority is James Spedding's *Letters and Life of Francis Bacon*, in 7 volumes, 1861—74.

⁵¹ Williams had secured the favour of Buckingham in 1620 by overcoming the scruples of Lady Catherine Manners and her father, the Earl of Rutland, in regard to Buckingham's proposal of marriage.

⁵² Spence, *The Equitable Jurisdiction of the Court of Chancery*, Vol. I (1846), pp. 402—405.

Sir Richard Lane conducted the defence of Strafford in 1641 with so much ability that the Commons abandoned the impeachment and had recourse to a bill of attainder. He was appointed C.B. in 1644, and L.K. in 1645. In 1646 he was in charge of the military defence of Oxford, the surrender of which he negotiated under instructions from the King. He was required to deliver up the Great Seal, which was then ceremoniously broken in the presence of the Commons at the bar of the Lords.

A new Great Seal was engraved by order of the Commons and accepted by the Lords. It was held in joint custody by a series of Commissioners, the most important of whom was Bulstrode Whitelocke,⁵³ son of Sir James, who was a Justice of the King's Bench, 1624—32. Whitelocke was Commissioner at the time of the trial of Charles I in January, 1649, with Thomas Widdrington as his colleague. They both went into hiding during the proceedings, but returned to London after they were over. Meanwhile yet another Great Seal had been adopted which, unlike its predecessors, did not bear the royal insignia. Widdrington refused an offer of the custody of this republican seal, but Whitelocke accepted it with two fellow Commissioners.

In December, 1653, under the Instrument of Government, of military origin, Oliver Cromwell became Protector. His first Commissioners of the Great Seal were Whitelocke and Widdrington, whose scruples had abated. But their opposition to Cromwell's ordinance for the reform of the Court of Chancery led to their dismissal.

Richard Cromwell, who succeeded as Protector in September, 1658, reappointed Whitelocke as first Commissioner in January, 1659. He held office until Richard's deposition in May, 1659. Subsequently during the last few months of the Interregnum he was sole Lord Keeper under the Committee of Safety.

After the Restoration Whitelocke lived in retirement until his death in 1675, having been pardoned by Charles II, whom he thanks for 'restoring him to a wife and sixteen children.' He was a voluminous author: the best known of his works is his *Memorials of the English Affairs from the beginning of the reign of Charles I to the happy Restoration of King Charles II.*

The Finches were so prominent a legal family in the 17th century that a note on their genealogical tree may be of interest.

1. Their ancestor was Sir Thomas Finch, of Eastwell in Kent, a soldier who was knighted in 1553 for his services against Sir Thomas Wyatt, and on other occasions.

2. Thomas' eldest son, Moyle, was a man of influence at Court. He

⁵³ Bulstrode Whitelocke, who was a nephew of Edward Bulstrode, the author of the law reports of that name, was born in 1605, and was called to the Bar at the Middle Temple in 1626. In 1633, when the four Inns of Court jointly produced a masque before the King and Queen, he and his life-long friend, Edward Hyde, afterwards Earl of Clarendon, represented the Middle Temple on the committee.

was one of the first members of the new order of baronets, created in 1611. His widow was created Countess of Winchilsea.

3. Moyle's fourth son, Heneage, was a serjeant-at-law, was knighted, and was Speaker in Charles I's first Parliament, 1625—26.

4. Heneage's eldest son, Heneage, was appointed S.-G. at the Restoration and created a baronet. He became A.-G. in 1670, L.K. in 1673, L.C. and Lord Finch in 1674, and 1st Earl of Nottingham in 1681. He died in 1682. He has been traditionally described as the father of Equity.

5.—(i) Nottingham's eldest son, Daniel, an active politician, inherited, as well as his father's title, the senior earldom of Winchilsea. So the two earldoms have since been held together.

5.—(ii) Nottingham's second son, Heneage, was appointed S.-G. in 1678 by Charles II, but was removed by James II. He was subsequently the leading counsel on behalf of the seven bishops. He was created Lord Guernsey in 1703, and Earl of Aylesford on the accession of George I in 1714.

We now return to 1, the ancestor Sir Thomas.

2. His second son, Henry, was a serjeant-at-law, and was knighted. He wrote a legal treatise, *Nomotechnia*, a description of the common law compared with the law and procedure of other jurisdictions. It was published in 1613, in Law French, but was soon translated into English. As a book of its kind it was of great value, and was not superseded until the publication of Blackstone's *Commentaries* in 1765—69.

3. Henry's son, John, was appointed King's Counsel and knighted in 1626. In 1628 he was Speaker in the Parliament next but one to that in which his cousin, Heneage, had served. In February, 1629, when Sir John Eliot presented a remonstrance on the subject of tonnage and poundage, Finch refused to put the question and rose to adjourn the debate. But he was forced back into the chair and held there.

In October, 1634, he was appointed C.J.C.P. In that capacity he was mainly responsible for the opinion subscribed by all the Judges in 1637 on the subject of the legality of ship-money. In January, 1640, he was appointed L.K., and in April he was created Lord Finch. One of the first acts of the Long Parliament, which assembled in 1640, was to exhibit articles of impeachment against him. He fled to Holland in December. He returned with Charles II in 1660, but died in the same year. As he left no son his peerage became extinct.

THE RESTORATION OF FRUITS BY THE *BONA FIDE* *POSSESSOR*

DAVID DAUBE

THE following remarks are intended to show that there exists no irreconcilable conflict between C. Just. 3.32.22 and C. Theod. 4.18.1. This is a strictly limited purpose, and the author does not propose to attempt any further conclusions as to the complicated history of the restoration of fruits in the *rei vindicatio*. It may be well to quote the two texts that form the subject of this article.

C. Just. 3.32.22, Diocletianus et Maximianus AA. et CC. Diodoto (294 A.D.). *Certum est mala fide possessores omnes fructus solere cum ipsa re praestare, bona fide vero extantes, post litis autem contestationem universos.*

C. Theod. 4.18.1, Valentinianus et Valens AA. Olybrio Praefecto Urbi (369 A.D.). *Litigator victus quem invasorem alienae rei praedonemve constabit, sed et qui post conventionem rei incubarit alienae, non in sola rei redhibitione teneatur, nec tantum simplorum fructuum praestationem aut eorum quos ipse percepit agnoscat, sed duplos fructus et eos quos percipi oportuisset, non quos eum redegissee constabit, exsolvat. Et praedoni quidem ratio a die invasi loci usque ad exitum litis habeatur, ei vero qui simpliciter tenet ex eo quo re in iudicium deducta scientiam malae possessionis accepit. Heredis quoque succedentis in vitium par habenda fortuna est. Addimus etiam ut impensas sumptusque litis re ad finem deducta petitoribus praestent.* The text goes on to deal with plaintiffs who cannot substantiate their claims.

C. Theod. 4.18.1 recurs in an abridged form in C. Just. 7.51.2. *Litigator victus qui post conventionem rei incubarit alienae non in sola rei redhibitione teneatur, nec tantum fructuum praestationem aut eorum quos ipse percepit agnoscat, sed eos quos percipi oportuisse, non quos eum redegissee constabit, exsolvat ex eo quo re in iudicium deducta scientiam malae possessionis accepit. Heredis quoque succedentis in vitium par habenda fortuna est.* Here the text ends, in this version.

It is universally held that, in classical law, a *bona fide* possessor acquired for good all fruits separated before *litis contestatio*: he acquired all fruits for good, that is to say, he was not compelled to account to the owner suing him for any of them, consumed or unconsumed. From C. Just. 3.32.22 (and other evidence which need not here be quoted) it is clear that, under Justinian at any rate, he had to restore those still existing. As C. Just. 3.32.22 purports to contain the view of the emperors of 294 A.D., and as it states the obligation to restore unconsumed fruits as settled law (*certum est . . . solere*), it was thought, up to some seventy years ago, that the rule laid down in this enactment, though not classical,

was not much later. Since Alibrandi¹ and Czyhlarz,² however, suggested a contrast between C. Just. 3.32.22, purporting to date from 294, and C. Theod. 4.18.1, of 369, the latter text, in their opinion, still maintaining the classical position, more and more authorities have pronounced against the authenticity of the former.³ Actually, in modern literature, wherever the relation between these two enactments is considered at all,⁴ C. Just. 3.32.22 is declared interpolated: and the rule that it states is said to be very late, possibly as late as Justinian. This theory is accepted even by the more cautious writers on Roman Law.⁵

It is not intended here to decide whether or not C. Just. 3.32.22 is corrupt, and whether or not the rule it states is very late. All that the author sets out to do is to show that it is rash to assume a conflict between this enactment and C. Theod. 4.18.1. More precisely, it is by no means certain, the author submits, that C. Theod. 4.18.1 rests on the classical law (or better, what is universally taken as such), giving the *bona fide possessor* all fruits before *litis contestatio*, even the unconsumed. It is, indeed, not possible to prove that the text presupposes the law of C. Just. 3.32.22. But it can be demonstrated, the writer believes, that there is nothing in it necessarily inconsistent with that law.

Those who hold that C. Theod. 4.18.1 represents the classical law seem to rely on the following passage: *Et praedoni quidem ratio a die invasi loci usque ad exitum litis habeatur, ei vero qui simpliciter tenet ex eo quo re in iudicium deducta scientiam malae possessionis accepit.* This passage alone is cited by Girard,⁶ for instance, who remarks that here we have the classical law pure and simple. The *praedo*, the *mala fide possessor*, he says, has to account for the fruits from the moment when he seizes possession, the *bona fide possessor* only from *litis contestatio*. Similarly, Czyhlarz, with obvious reference to this passage, argues⁷ that C. Theod. 4.18.1 distinguishes between the *praedo* and him *qui simpliciter tenet*, the former having to restore the fruits *ex die invasi loci*, the latter from *litis contestatio*. The enactment, therefore, must date from an earlier period than C. Just. 3.32.22, which demands that the *bona fide possessor* should account for such fruits as are still existing at the time of *litis contestatio*.

If C. Theod. 4.18.1 consisted solely of the passage adduced, and if, moreover, this passage were meant as an exhaustive regulation of the treatment of fruits in *rei vindicatio*, the conclusion drawn from it in modern

¹ *Teoria del Possesso*, 1871, pp. 126 ff. The present writer has found it impossible to get hold of this book (or, for that matter, of Alibrandi's *Opere* in which it is included).

² *Eigentumsverbsarten* (in Glück, *Pandekten*, 41—42), 1887, pp. 559 ff.

³ Czyhlarz himself did not declare it interpolated but connected it with *hereditatis petitio*: see below, p. 42.

⁴ It is not considered, for instance, by Sohm-Mitteis-Wenger, *Institutionen*, 17th ed., 1933, p. 313, n. 12. The authors seem to have missed the various discussions of C. Theod. 4.18.1: they mention only C. Just. 3.32.22, without, apparently, being aware that this text is under a cloud.

⁵ See Girard, *Manuel de Droit Romain*, 7th ed., 1924, pp. 338 f.; Buckland, *Text-Book of Roman Law*, 2nd ed., 1932, pp. 225 f.; De Zulueta, *Digest* 41.1 and 2, 1922, p. 35 (on Dig. 41.1.40, Africanus).

⁶ *Op. cit.*, p. 338, n. 4.

⁷ *Op. cit.*, p. 563.

literature would be unimpeachable. In point of fact, however, the passage forms part of a larger text and must be interpreted in connection with the rest. It might, perhaps, be claimed, in favour of the view here combated, that an examination of the whole leads to no different result. In the portion preceding the crucial passage, it might be urged, there is no allusion to the *bona fide possessor* whatever. Certain penal obligations regarding fruits are imposed on (1) *praedo* or *invasor*, i.e., the ordinary *mala fide possessor*, and (2) on him who *post conventionem rei incubarit alienae*, i.e., him who seizes the object in dispute after *litis contestatio*. Then, it might be said, the text proceeds to distinguish between all these *mala fide possessores*, who have to account for fruits from the outset, on the one hand, and the *bona fide possessor*, who has not to account until *litis contestatio*, on the other. On this interpretation, it would still follow that, when C. Theod. 4.18.1 was laid down, a *bona fide possessor* could keep all fruits before *litis contestatio*.

The interpretation, however, is not tenable. There is, indeed, no means of knowing whether it really is the interpretation that the followers of the accepted theory have in mind: the present writer has not come across any book or article where the whole of C. Theod. 4.18.1 is discussed—the argument is always restricted to that brief passage cited by Girard. What makes him think that some authorities at least base on the interpretation outlined is the fact that, in Heumann-Seckel, the verb *incubare*, as used in C. Theod. 4.18.1, is said to mean ‘to seize, to take possession of.’⁸ Consequently, according to Heumann-Seckel at least, the first sentence of C. Theod. 4.18.1 speaks of (1) *praedo* or *invasor*, and (2) him who seizes the object in dispute after *litis contestatio*.

There are several considerations speaking against this interpretation. It is, for instance, difficult to understand why the enactment, if it begins by dealing with those only who get hold of another man’s property *mala fide* (namely, the *praedo* or *invasor* who seize the object before *litis contestatio* and the *incubans* who seizes it after), should add an entirely disconnected remark on the *bona fide possessor*: *ei vero qui simpliciter tenet*, etc. The decisive objection, however, is that *qui post conventionem rei incubarit alienae* cannot possibly mean ‘he who seizes the object in dispute after *litis contestatio*.’ For, in the first place, the text is concerned with the restoration of fruits by the unsuccessful defendant, not plaintiff, in a *vindicatio*. But how should the defendant, who is sued because he possesses the object in dispute, seize it after *litis contestatio*? (Maybe it would be possible to think of exceptional situations where he might; but there is no sign that the enactment has reference to these.) In the second place, quite apart from this, it is hard to find any reason why the text should distinguish between *praedo* or *invasor* on the one hand and him who seizes the object in dispute after *litis contestatio* on the other. He who seizes the object after *litis contestatio*, whether plaintiff or defendant,

⁸ *Handlexikon*, 9th ed., 1907, p. 258: *sich bemächtigen, in Besitz nehmen*.

obviously is a *mala fide possessor*. (Again, very exceptional situations might, perhaps, be constructed.) That the text should make special mention of him, as distinct from *praedo* or *invasor*, seems scarcely credible. In the third place, *incubare* ought to be translated, not by 'to seize,' but by 'to retain' or, more precisely, 'to retain unjustly.' As the word is rendered by 'to seize' in Heumann-Seckel, it is necessary to give some evidence for the view here taken.

Wherever *incubare* or its derivatives appear in a legal, quasi-legal or even faintly legal context, the reference is to retention of a thing and, in most cases, to unjust retention.⁹

(1) C. Theod. 10.1.15 (Aracadius et Honorius, 396 A.D.), repeated, with slight modifications, in C. Just. 7.38.3 and 11.67.2, ordains that land which used to belong to the Crown, but has been wrongfully appropriated by private persons, should return to the Crown. Neither special rescripts fraudulently obtained nor the *praescriptio longi temporis* nor any plea based on the new *census* are to avail the present holders. For, the enactment says, the right of the emperors is abolished neither by a *precatio colorata* nor *incubatio diuturna* nor *novella professio proprietatis*. It is plain that *incubatio diuturna* in this text corresponds to *praescriptio longi temporis*. What the legislator means is that unjust retention, however prolonged, is no adequate basis for a *praescriptio*. *Incubatio* denotes 'unjust retention.' Similarly, according to C. Theod. 16.10.20.1 (Honorius et Theodosius, 415 A.D.),¹⁰ pagan temples must no longer be used in Carthage or any other African metropolis, but be given up to the Crown. With the temples, all income accruing after this enactment will have to be handed over by the priests: *ita ut . . . fructus ab incubatoribus exigantur*. The priests are described as *incubatores* of the temples, as holding them unjustly. At least from the publication of this law onwards, their possession is illegal: and it is interesting to note that, as in C. Theod. 4.18.1, the *incubatores* have to restore not only the principal object, but also the fruits. The background of Cicero Verr. 2.1.45.116 is somewhat obscure and several explanations have been put forward. For the purpose of this note, it is not necessary to try and disentangle the problems: the relevant points are clear enough. A friend of Verres, if we are to believe

⁹ The original sense of *incubare*, 'to lie in, upon,' is noticeable also in all non-legal texts where the verb occurs. In Florus 1.10.2, according to Lewis & Short, *s.v. incubo*, the verb means 'to take up a position at.' Here, one might perhaps think, is an exception, the emphasis lying on the seizing of a thing rather than on the resting upon a thing. But the passage in question runs: *Hunc tamen, quamvis et armis et fame urgeret occupatoque Ianiculo in ipsis urbis faucibus incubaret, sustinuit, repulit*. Of this, the most natural rendering seems to be that given by Forster in *The Loeb Classical Library*, 1929: Although he (Porsenna) pressed hard upon them (the Roman people) both with arms and with famine, and, having seized the Janiculum, held the very approach to the city, they withstood and repelled him . . . *Incubare* here means 'to hold,' 'to be posted at,' not 'to take up a position at.' Comp. the very similar use of *incubare* in Florus 2.6.57: *Sic factum est ut inhaerentem atque incubantem Italiae extorqueret Annibalem*, He (Scipio) thus (by descending on Africa itself) succeeded in making Hannibal release his grip upon Italy, to which he was still clinging and over which he still brooded. On a few texts with the perfect *incubui*, see below, p. 38, n. 14.

¹⁰ An abridged version appears in C. Just. 1.11.5. It does not contain the passage with the *incubatores*.

Cicero, claimed to be Minucius' heir and took charge of the dead man's estate. Verres, as praetor, protected him though he could produce no evidence whatever to support his claim. He protected him by issuing an edict in which, instead of saying on what principles praetorian, technical *possessio* of the estate (which was distinct from possession, mere actual control, in the ordinary sense and brought with it considerable legal advantages) would be granted, assumed that the praetorian, technical possessor was already ascertained. This method is violently criticized by Cicero: *Iam quid ad praetorem uter possessor sit? Nonne id quaeri oportet utrum possessorem esse oporteat? Ergo quia possessor est, non moves possessione; si possessor non esset, non dares.* Pseudo-Asconius, approving of Cicero's argument, explains that Verres proceeded *quasi iam probaverit possessorem esse eum qui incubavit . . . ergo nec adimere tibi licet possessionem incubanti nec dare iure poscenti: quod cum utrumque fieri oporteat, cur hunc possessorem nominas a quo corruptus es, quasi eum, quia possessor dicitur, movere de possessione non posses? Incubare* here means 'to hold without any title' and is opposed to *possessio*, 'holding under praetorian authorization.' Pseudo-Asconius says that Verres acted as if his friend (who had bribed him—this, however, not even Cicero maintains; it is a charge entirely due to the commentator's imagination), because he *incubavit*, because 'he simply, arbitrarily kept' the estate, must be its praetorian, technical possessor. On the basis of such an edict, Pseudo-Asconius explains, it would be impossible either to take away the estate from an 'unjust holder,' *incubanti*, or to give it to a person having a proper claim to it. But precisely this was Verres' object (according to Pseudo-Asconius): he called his friend *possessor* in the technical sense precisely in order that the estate could not be taken from him. *Incubare* refers to the unjust holding of an estate to the exclusion of the real heir also in Fronto, ed. Naber, p. 13. The verb occurs in a speech made by Fronto and partly preserved in a letter of M. Aurelius to Fronto, in which M. Aurelius quotes what he considers the finest portion of the speech (it is the letter which, after the usual heading, begins with the words, *Nae ego impudens*). It seems that the speech was directed against the suggestion to lay down certain rules concerning disputes about wills in oversea provinces. The legislation proposed was to entitle the nearest relative of a deceased man, if there was a testament, to demand that it be sent to Rome, that it be opened there, and that any law-suit arising out of it be conducted before the Roman court: in the meantime, the nearest relative was to remain in possession of the estate. Fronto's speech appears to have been directed against this plan. The result of such rules as those proposed, he argues, would be that the nearest relative, if he had the slightest reason to suspect that he was disinherited in the will, would have the will sent up to Rome and, when he was sued there, would find excuses for not turning up, violent storms preventing him from crossing the sea and so on. All this while he would live on the

estate which was not really his. *Quid ille cogitat aliud quam bonis alienis incubare, fructus diripere, agros vastare, rem omnem dilapidare? Non ille ita stultus est ut malit venire ad Caesarem et vinci quam remanere in Asia et possidere.* *Incubare* means 'to retain unjustly.' The disinherited relative depicted by Fronto will prefer to stay put and keep the estate which he knows belongs to another man rather than make the journey to Rome and lose it.¹¹ An express definition of *incubare* as 'to retain unjustly' is to be found in Servius ad Verg. Aen. 1.89. Virgil, in the course of describing the dreadful storm let loose by Aeolus at Juno's request, says: *ponto nox incubat atra*, black night broods over the deep. Servius comments: *incubat ideo dixit quod alienum tempus invasit. Nam incubare proprie dicitur per vim rem alienam tenere.* The night holds the day by force, thus Servius understands the phrase from Virgil.

(2) The verb *incubare* is relatively frequent where it is a question of brooding over a treasure, sitting upon one's wealth. Here also, he who *incubat* is doing something unjust, though not in the strictly legal sense of the cases considered under (1): it is deemed useless and worse to watch jealously over one's goods (and the goblin-guardians of treasures are ill-natured beings). Virgil Georg. 2.507 describes as one of the vain ambitions of men of the world, as opposed to those who choose happiness as farmers, the brooding over buried gold: *condit opes aliis defossoque incubat auro*. In Aen. 6.610 f., the poet goes as far as to place among the impious suffering terrible tortures after death those who found riches but, instead of sharing them with their relatives and friends, retained all for themselves: *aut qui divitiis soli incubuere repertis, nec partem posuere suis*.¹² Quintilian 10.1.2 explains that merely to know what to say and how to say it is not enough for an orator: unless he is able to speak, he will be like a man who broods over shut up treasures. *Et qui sciet quae quoquo sint modo dicenda, nisi tamen . . . habuerit eloquentiam, velut clausis thesauris incubabit.* In Apuleius Met. 4 we are told of a rich man at Thebes who, in order to evade public offices and burdens, pretends to be poor. *Denique solus ac solitarius parva . . . domuncula contentus, pannosus alioquin ac sordidus, aureos folles incubabat*: he constantly brooded over his bags of gold. Martial 12.53 censures Paternus who, though rich enough, gives nothing away and broods over his treasure, *incubasque gazae*, like the dragon that guarded the golden fleece. Finally, *Incubo*, according to Petronius 38.8, is the name of the goblin-guardian of a treasure whose

¹¹ It is probably not permissible to press the words of this speech as one does those of a text of Julian. If it were, one might say that the wicked relative can plunder the fruits and ravage the fields without any fear of the day of reckoning because, though in reality he is an *incubator*, an 'unjust holder,' yet so long as the Roman court has not decided against him, he holds on the basis of an enactment (assuming the proposed legislation is carried through). Surely, a person who holds on the basis of an enactment must, in law, be treated as a *bona fide possessor*; and the *bona fide possessor* of an inheritance, under the *senatusconsultum Juventianum*, is liable only for enrichment. However, Fronto most likely does not think of these subtleties, but simply means that the relative has no intention ever to present himself for the lawsuit at Rome, feels perfectly safe in Asia and wastes the true heir's property just as he likes.

¹² See, however, below, p. 38, n. 14, on an alternative rendering of this passage.

cap, the rumour goes, one of Trimalchio's fellow-freedmen must have seized: he thus found his treasure—how otherwise could he be so wealthy?

(3) In the following two passages it is doubtful whether, in using *incubare*, emphasis is laid on the unjust retention of property in the legal sense, as in the cases enumerated under (1), or on the greedy brooding over one's wealth, as in the cases listed under (2). Probably both elements come in, and one might say that *incubare* here denotes 'to brood over ill-gotten goods.' The situation in Pro Clu. 26.72 is this. According to Cicero, Oppianicus (the father of the present prosecutor), when he was prosecuted by Cluentius, gave a large sum of money to Steianus, who had undertaken to bribe his fellow-judges. Steianus, however, worked out a scheme by which he might keep all for himself. He considered that, if he ensured the condemnation of Oppianicus instead of his acquittal, there would be nobody to claim the money back from him. Therefore, in order to make his fellow-judges angry with Oppianicus, he promised them presents in Oppianicus' name but, when they asked him for them, declared that Oppianicus had retracted his promise. *Hic ille planus improbissimus . . . qui illi pecuniae quam condiderat spe iam atque animo incubaret . . . pulcre adseverat sese ab Oppianico destitutum.* The words *illi pecuniae spe iam atque animo incubaret* may be rendered either by 'he was brooding over this money with eager hopes' (thus Grose Hodge, in *The Loeb Classical Library*, 1927), or by 'in hopes and imagination he already retained this money (*scil.* having succeeded in carrying out his scheme).' Very likely, Cicero has in mind a combination of these alternatives. Livy 6.15.5 records how M. Manlius, who had recklessly charged the patricians with concealing Gallic gold, was asked by Camillus to make good his charge: *te, M. Manlie, adhortor . . . istos incubantes publicis thesauris ex praeda clandestina evolvas.* Here, *incubare* may be employed in the sense of 'to brood over a treasure' or in that of 'to retain unjustly another's property.' Once again, it is probable that both senses are implied.

(4) *Incubator* may signify 'tyrant,' a man holding a country with no proper title. In Aen. 7.266, Virgil uses the word *tyrannus* of a legitimate king (*Pars mihi pacis est dextram tetigisse tyranni*). On this, Servius comments: *Tyranni. Graece dixit, id est regis. Nam apud eos tyranni et regis nulla discretio est: licet apud nos incubator imperii tyrannus dicatur: sane apud Graecos hic et haec tyrannus declinatur.* Similarly, Macrobius, Somn. Scip. 1.10, records an anecdote of *Dionysius, aulae Siculae inclementissimus incubator.*

In view of this evidence, it is impossible to translate *incubare* in C. Theod. 4.18.1 otherwise than by 'to retain unjustly': and the translation 'to seize' must be rejected.¹³ If it were needed, there would be a further point to confirm this result. According to Facciolati, who is followed by Lewis & Short and others, the regular perfect of *incubare*

¹³ Heumann-Seckel's rendering should be altered into *unrechtmässig besitzen, zurückhalten.*

is *incubui*; the perfect *incubavi* is rare and can be used only *quum refertur ad aves ova foventes*. Obviously, the lexicographers have overlooked C. Theod. 4.18.1 and Pseudo-Asconius ad Cic. Verr. 2.1.45.116, where the form *incubavi* refers, not to birds sitting on their eggs, but to the retention by one man of another man's property. It is safe to assume, however, that if the form *incubavi* is primarily employed in connection with the brooding of birds, it must, where it is used of persons, denote the keeping of a thing rather than the seizing of a thing.¹⁴

To return to the interpretation of C. Theod. 4.18.1, the clause *qui post conventionem rei incubarit alienae* has to be rendered by 'he who retains (not: seizes) the object in dispute after *litis contestatio*.' Proceeding from this translation, we shall encounter none of the difficulties created by that here combated. The enactment begins by imposing a strict, penal liability for fruits on (1) *praedo* or *invasor*, i.e., the *mala fide possessor*, and (2) 'him who retains the object in dispute after *litis contestatio*,' i.e., the *bona fide possessor* if he continues to keep the thing after *litis contestatio*. That he who *post conventionem incubarit* is the *bona fide possessor* is confirmed by the opening of the clause regarding him with *sed et*: the text says that the penal rules concern *praedo* or *invasor*, the *mala fide possessor*—*sed et* him who retains the object after *litis contestatio*, 'but also' the *bona fide possessor* if he keeps the thing. After stating the extent of the liability for fruits, the enactment goes on to make clear from what time the rules apply in various cases. As is logical, the distinction here made corresponds precisely to that made in the first sentence. The *praedo*, the *mala fide possessor*, is to be liable under those penal rules from the moment that he took possession, while he who *simpliciter tenet*, the *bona fide possessor*, is to be liable under those rules from *litis contestatio* only. The *praedo* of the second sentence of the enactment, that is, is the *praedo* of the first, the *simpliciter tenens* of the second sentence is the *post conventionem incubans* of the first. The meaning of the whole, then, is as follows. The losing defendant in a *rei*

¹⁴ Professor Cary, to whom the author submitted this conclusion with a request for criticism, suggests that Facciolati and Lewis & Short may be wrong altogether in making *incubui* an alternative perfect of *incubare*; and that most probably *incubavi* is the only perfect of *incubare*, *incubui* always belonging to *incumbere*. Passages like Horace Od. 1.3.31 (saying that after the theft of the fire from Olympus, a multitude of unheard of diseases *terris incubuit*, 'fell upon the lands'), Ammianus 24.8.6 (referring to a rumour *Persas nobis viantibus incubuisse*, 'that the Persians had fallen upon us on the way') and Lucanus 9.57 (where a widow speaks of *incubuisse viro*, of 'having fallen upon the corpse of her husband') seem to the author to support Professor Cary's view: the first two are listed under *incubare* by Facciolati, the third by Facciolati and Lewis & Short, but they all look like belonging to *incumbere*, in all of them the verb expresses a violent falling upon a thing rather than a prolonged resting upon a thing. Virgil Aen. 6.610 might perhaps create a difficulty, *aut qui divitiis soli incubuere repertis, nec partem posuere suis*. Yet, at a pinch, one could replace the rendering given above under (2) by 'or those who found riches and fell upon them alone (not: retained them alone), instead of sharing them with their relatives and friends.' Professor Cary observes that *incubuere* is balanced by *posuere*, which clearly denotes a single act, not a state of rest. By analogy, therefore, *incubuere* should also designate a single act, 'they fell upon' (Virgil, Professor Cary adds, had a fine sense of symmetry). However, the present writer is not competent to pronounce on a question of philology.

vindicatio, be he a *mala fide* possessor or be he a *bona fide* possessor who retained the object in dispute after *litis contestatio*, has to pay double the value of the fruits, and not only of those which he took, but also of those which ought to have been taken: and whereas the *mala fide* possessor has to account for fruits in this way from the moment he seized possession, the *bona fide* possessor has to do it from the moment of *litis contestatio* (since it was then that he should have given up possession). It may be added that Gothofredus, for example, gives exactly the same interpretation, without so much as considering the possibility of any other.

Is it true, as is asserted in modern literature, that this enactment gives the *bona fide* possessor for good all fruits separated before *litis contestatio*, thus rendering it impossible to consider as authentic C. Just. 3.32.22? The author submits that nothing compels us to make this assumption (though, indeed, there is nothing to rule it out). Supposing C. Just. 3.32.22 were genuine, dating from 294 A.D., would C. Theod. 4.18.1 inevitably have to be different from what it is? According to C. Just. 3.32.22, a *mala fide* possessor has to account for all fruits, existing or consumed, obtained after *litis contestatio* or before. A *bona fide* possessor, on the other hand, as far as fruits obtained before *litis contestatio* are concerned, has to restore merely those still existing; it is only from *litis contestatio* that he, too, has to account for those consumed as well. C. Theod. 4.18.1 introduces at least one penalty not imposed by C. Just. 3.32.22: the *mala fide* possessor, the emperors say, has to pay double the value, not merely the simple value, even of fruits obtained before *litis contestatio*. Very likely, some of the other rules laid down in this enactment are also innovations as compared with the law of C. Just. 3.32.22. It is probable, for instance, that the twofold payment after *litis contestatio* also is an innovation, both in the case of the *bona fide* possessor and in that of the *mala fide* possessor. However, it might conceivably be argued that the twofold payment after *litis contestatio* comes from the XII Tables, was maintained, in one form or another, throughout the classical era and is simply carried on by C. Theod. 4.18.1.¹⁵ The author, therefore, is content to base on the one point in C. Theod. 4.18.1 that is unquestionably new, the duty of the *mala fide* possessor to pay double the value even for the time before *litis contestatio*. That this is an innovation¹⁶ may be seen from a comparison of the language of C. Theod. 4.18.1 with that of C. Just. 3.32.22, from the fact that we do not find the rule before C. Theod. 4.18.1, and from C. Theod. 4.19 (Gratianus, Valentinianus et Theodosius, 390 A.D.). In C. Theod. 4.19, enacted some twenty years after 4.18.1, the rate of

¹⁵ See Festus on *vindiciae*: . . . *fructus duplione damnum decidito*; Paul. Sent. 5.9.2: *ex die accepti iudicii dupli fructus computantur*; and Pernice, *Labeo*, vol. II, part I, 2nd ed., 1895, p. 349, n. 4.

¹⁶ It may be repeated that by 'new' or 'an innovation' is here meant 'new as compared with C. Just. 3.32.22.' The author does not deny the possibility of C. Theod. 4.18.1 being a mere confirmation of rules that had come into existence before 369, and even the twofold payment by the *mala fide* possessor for the time before *litis contestatio* may be older than the enactment. What is decisive in this connection is that this provision at least is later than C. Just. 3.32.22.

interest to be applied to judgment debtors is doubled, *ut quia malae fidei possessores in fructus duplos conveniuntur, aequae malae fidei debitores simile damni periculum persequatur*.¹⁷ Clearly, there was a tendency in the last decades of the fourth century to impose double payment of fruits and the like on persons who kept back what they ought to give up. The question raised above can now be answered. Supposing C. Just. 3.32.22 were genuine, would C. Theod. 4.18.1 necessarily have to be different from what it is? The answer is that it would not. C. Theod. 4.18.1 ordains that, from now onwards, the *mala fide possessor* will have to pay, not merely the simple value, but double the value of the fruits for which he is liable; that the same rule is to apply to the *bona fide possessor* who retains the object in dispute after *litis contestatio*, since from *litis contestatio* he must be presumed to hold *mala fide* (there is no need here to examine the reasonableness of this presumption—it occurs quite frequently in the sources); and that, while the *mala fide possessor* will have to pay doubly from the moment that he seizes the object, the *bona fide possessor* will have to from *litis contestatio*. The present writer fails to see where this regulation is incompatible with a duty of the *bona fide possessor* to restore fruits unconsumed at the time of *litis contestatio*. In point of fact, the question whether or not a *bona fide possessor* has to account for fruits existing at *litis contestatio* is not touched by this enactment at all, be it explicitly or implicitly. Double payment of fruits is imposed on (1) the *mala fide possessor*, and (2) the *bona fide possessor* who, by keeping the object after *litis contestatio*, puts himself in the position of a *mala fide possessor*. That is all, and if we want to know what is the fate of fruits still unconsumed by the *bona fide possessor* at the moment of *litis contestatio* (or, for that matter, of fruits consumed by him before *litis contestatio*), we have to go to other texts than this.

The result here reached is supported by a consideration of C. Just. 7.51.2, Justinian's version of C. Theod. 4.18.1. Czyhlarz claims¹⁸ that C. Just. 7.51.2, in contradistinction to C. Theod. 4.18.1, reflects the post-classical law. He believes that (1) no distinction is made in C. Just. 7.51.2 between *bona fide possessor* and *mala fide possessor*, and (2) nothing is said about fruits before *litis contestatio* because now, under Justinian, the *bona fide possessor* has to account for them just like the *mala fide possessor*. There are, however, several flaws in this argument. First, if the text said nothing about fruits before *litis contestatio* because of the equality between *bona fide possessor* and *mala fide possessor*, why should it speak about fruits after *litis contestatio*? For Czyhlarz, of course, does not deny that the equality goes on after *litis contestatio*. Secondly, it is not correct to say that, under Justinian, the *bona fide possessor* has to account for fruits before *litis contestatio* just like the *mala fide possessor*. As is well known, a *bona fide possessor* has to account for unconsumed

¹⁷ See Pernice, *loc. cit.*

¹⁸ *Op. cit.*, pp. 563 f. Girard, *op. cit.*, p. 338, n. 4, repeats the claim but gives no arguments.

fruits only, a *mala fide possessor* for all. Thirdly, C. Just. 7.51.2 does distinguish between a *bona fide possessor* and a *mala fide possessor*. Only it is confined to a treatment of the position of the former. But that it speaks, not of any *possessor*, but of the *bona fide possessor*, or rather, of the *bona fide possessor* who retains the object after *litis contestatio*, is quite clear from the phrase *exsolvat ex eo quo re in iudicium deducta scientiam malae possessionis accepit*.

As a matter of fact, there are only two major deviations of C. Just. 7.51.2 from C. Theod. 4.18.1,¹⁹ none of which suggests an overthrowing of the basic principles underlying the latter text. In the first place, the double payment of C. Theod. 4.18.1 is reduced to a simple payment (and silence is observed on the losing defendant's duty to bear the victor's expenses). This seems to be in accordance with a more general policy pursued by Justinian: when we compare C. Just. 7.54.2 (Justinianus, 529 A.D.) with C. Theod. 4.19, mentioned above, we find that in the case of judgment debtors also he reduced the double rate of interest to the simple rate. In the second place, all that part of C. Theod. 4.18.1 which deals with the *mala fide possessor* is cut out. The most probable reason for this is that once the twofold payment of C. Theod. 4.18.1 is abolished, the liability of the *mala fide possessor* is adequately regulated in other texts, for instance, in C. Just. 3.32.22 (but also in the Digest). What remains of C. Theod. 4.18.1 is the rule that a *bona fide possessor* who retains the object in dispute after *litis contestatio* has to account not only for fruits actually taken by him but also for fruits that ought to have been taken. Thus, what remains is, in essence, precisely that element of C. Theod. 4.18.1 on which the theory of the classicality of that enactment rests.²⁰ If we conclude that as C. Theod. 4.18.1 imposes certain penal obligations on the *bona fide possessor* after *litis contestatio* he cannot be liable, at the time of this enactment, even for unconsumed fruits before *litis contestatio*, the same conclusion must be drawn with regard to C. Just. 7.51.2. In fact, Albertario, though otherwise upholding the current theory, has rightly seen that C. Just. 7.51.2 is just as classical as C. Theod. 4.18.1.²¹ The present writer sees in this support for his view: neither of the two versions is irreconcilable with the post-classical regime, under which a *bona fide possessor* has to restore fruits still existing at the moment of *litis contestatio*.

Here this article might end. As was remarked above, the object was not to prove C. Theod. 4.18.1 to be based on the post-classical system of

¹⁹ This is leaving out of account the total elimination of the second half of C. Theod. 4.18.1, concerning plaintiffs who are unable to prove their case.

²⁰ It was shown above, however, that those who adhere to this theory have in mind a different interpretation of the relevant clause in C. Theod. 4.18.1, taking *incubare* as meaning 'to seize' instead of 'to retain.'

²¹ *La Responsibilit  del 'Bonae Fidei Possessor,'* *Bulletino dell' Istituto di Diritto Romano*, 26, 1913, p. 249. He says that C. Theod. 4.18.1, giving the *bona fide possessor* for good all fruits before *litis contestatio*, recurs in C. Just. 7.51.2, *alterata, ma non a questo riguardo*. The supposed conflict between C. Theod. 4.18.1 and C. Just. 3.32.22 is noted at p. 258, n. 2.

restoration of fruits or C. Just. 3.32.22 to be genuine, but merely to show that C. Theod. 4.18.1 is not inconsistent with the post-classical system and not inconsistent, therefore, with C. Just. 3.32.22. This the author has tried to do. If it is still maintained that C. Just. 3.32.22 is not genuine, it must be maintained on grounds other than a conflict with C. Theod. 4.18.1; but these, whatever they may be, are outside the scope of this article. It may, however, be permissible, in conclusion, briefly to comment on one argument advanced against the authenticity of C. Just. 3.32.22, the argument from style. Pernice speaks of the bad style of the enactment, without specifying any details.²² Albertario seems to agree, for he simplifies the text (besides making it into a statement of the classical position) by striking out, as interpolated, *extantes*, *autem* and *universos*.²³ According to a footnote attached to the enactment by Krueger,²⁴ Czychlarz emends the text by ejecting everything from *extantes* and putting instead *possessore post litis contestationem perceptos*. It looks, however, as if Krueger had misunderstood Czychlarz. As far as the author can see, Czychlarz attempts no emendation of C. Just. 3.32.22, but suggests that it originally referred, not to *rei vindicatio*, but to *hereditatis petitio*—in which connection the *bona fide possessor* was liable for enrichment from the *senatusconsultum Juventianum* onwards.²⁵ Be this as it may, it must be admitted that C. Just. 3.32.22 sounds a little involved. Only once we start making it smooth by bracketing what is inconvenient, we are not restricted to the possibilities chosen by those who would arrive at a classical rule. One might well hold, for example, that the text is in order up to *extantes*; and that *post litis autem contestationem universos* has been added by somebody whom Beseler would call a 'completomaniac.' This person, it might be urged, may have been actuated precisely by C. Theod. 4.18.1 or C. Just. 7.51.2 where, as we have seen, the strict liability of the *bona fide possessor* after *litis contestatio* is stressed.

On the whole, the author is inclined to assume that, provided the text has suffered at all, it has been shortened by the compilers, not lengthened. Possibly it contained something about the various actions to be used for claiming fruits existing and fruits consumed, as does C. Just. 4.9.3, an enactment dating from the same emperors and the same year.²⁶ For Justinian, the distinction between *vindicatio* and *condictio*

²² *Op. cit.*, p. 356.

²³ *Op. cit.*, p. 256.

²⁴ *Codex Iustinianus*, ed. ster., 1915.

²⁵ *Op. cit.*, p. 563. The suggestion is adopted by Girard, *loc. cit.* Needless to add, Czychlarz wrote long before Albertario claimed (*op. cit.*, p. 275) that, even under the *senatusconsultum Juventianum*, a *bona fide possessor* was not bound in classical law to restore fruits received before *litis contestatio*.

²⁶ *Mala fide possidens de proprietate victus extantibus fructibus vindicatione, consumptis vero conditione conventus, horum restitutioni parere compellitur*. Czychlarz, *op. cit.*, p. 563, n. 62, adduces this text in support of his view that C. Just. 3.32.22 cannot have been applicable to *rei vindicatio* in 294 A.D. But, in the first place, as observed in the text, it may be that C. Just. 3.32.22 originally did mention the various actions to be used for claiming the fruits. In the second place, even if it did not, there is nothing in it that contradicts C. Just. 4.9.3. We must not press the words *cum ipsa re*: they do not neces-

in the matter of fruits was no doubt of very minor importance. But this is not conceding that the style of C. Just. 3.32.22 is impossible in an enactment of 294. Before this can be maintained, we ought to be absolutely sure that the emperors of the time, if they wished to express in a terse form what this text says, could have done it better. The fact is that, if the enactment sounds involved, so is the actual law that it lays down. The present writer agrees with Professor Buckland when he says (though accepting the suggestion of a conflict between C. Theod. 4.18.1 and C. Just. 3.32.22) that C. Just. 3.32.22 'has no sign of alteration.'²⁷

sarily mean that there are to be no separate actions for the fruits. In the third place, it is by no means certain whether C. Just. 4.9.3 is intended as a serious requirement of a special *vindicatio* for extant fruits, a special *condictio* for consumed.

²⁷ *Op. cit.*, p. 226.

LORD ATKIN OF ABERDOVEY

H. C. GUTTERIDGE

THE death of Lord Atkin has deprived our English law schools of one of their staunchest friends, and will be deeply deplored by all who have the cause of legal education at heart. The teaching and the study of the law meant much more to him than a mere preparation for professional life, for the law was 'all the time the object of his fervent and almost passionate devotion,'¹ and he was unswerving in his insistence that it should have the place due to it in the *studium generale* which connotes the unity of knowledge. The full extent of the services which he rendered to legal education will probably never be known, because he was not given to seek publicity for his opinions or his achievements, but it is largely due to his zeal and enthusiasm that our law schools now occupy a very different position from that held by them a quarter of a century ago. His influence made itself felt in two directions. The improvement in the status of law teachers is in no small measure the result of his efforts on their behalf, and he also played a leading part in securing the establishment of closer contact between the academic and practising sides of the law.

The first part of the Report of the Legal Education Committee, 1934, which was drafted by him, contains an expression of his views on the future of legal education in England. He regarded it as essential to maintain the co-existence of the professional and the academic law schools, because he felt, in the first place, that the professional bodies satisfied a need which could not be met by the law faculties, since there is—and always will be—a type of student who for one reason or another cannot take advantage of the facilities offered by the universities. Further, there was, in his opinion, justification for the diversion of legal studies into those which emphasize the practical side, and those which stress the scientific or cultural aspects of the law, though he urged that care should be taken not to exaggerate this distinction which must be confined within its proper limits. Holding these views he was a strong supporter of the policy which would endeavour to abolish or minimise the duplication and overlapping of instruction, and to assign to each type of law school that sphere of legal training for which it is best fitted. If full effect could have been given to this policy a great step in advance would have resulted, but this has not proved to be possible for certain reasons which cannot be discussed here. Some degree of success has, however, been attained in the increased recognition given by the profession to the law examinations of the universities. It may be added that Lord Atkin was also convinced of

¹ Lord Wright in the *Law Quarterly Review*, October, 1944.

the value of a legal education quite apart from any qualification for practice which it might confer, a belief which is supported by the recent growth in numbers of students who take law as their subject, but have no intention of devoting themselves to a professional career.

Many of us will treasure the memory of Lord Atkin, not only as a great master of the common law, but also as one whose constant endeavour it was to ensure that the duty of training the lawyers of the future should be regarded as one of the most important and honourable tasks which may fall to the lot of a member of our profession.

'TO A AND HIS ISSUE': THE LAW OF PROPERTY ACT, 1925,
SECTION 130 (2)

R. E. MEGARRY

MR. S. J. BAILEY'S article, 'The Law of Property Act, 1925, s. 130 (2),' published in this JOURNAL in 1936 (Vol. 6, p. 67), appears to have attracted no dissent and weighty approbation. The article assailed commonly-held but little-discussed views on the effect of the sub-section, and reached conclusions which have been accepted by authorities such as Professor Cheshire.¹ With a due sense of my temerity I propose to launch a frontal attack on this well-entrenched position.

First, the nature of the problem must be stated. The sub-section reads as follows:—

'Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.'²

One of the obvious difficulties in construing a sub-section such as this is the complexity of the wording. To simplify the problem, which is to ascertain the effect after 1925 of informal words of limitation which would have sufficed to create an entail in a will before 1926, it is proposed to take a typical case to which the sub-section applies, namely, a devise 'to A and his issue,' and to discard from the sub-section everything which is not relevant to that case. On this footing, personalty, executory limitations and 'the next succeeding section' (which abolished the Rule in *Shelley's Case*) can be disregarded; and expressions such as 'after the commencement of this Act' may conveniently be cut down to 'after

¹ *Modern Real Property* (5th ed. 1944), p. 357 *et seq.* Mr. Rivington also seems to have been converted by it. Although the second edition of his *Law of Property in Land* (1937), pp. 102, 103, does not directly cite the article for the point in question, the article is referred to on p. 102 and Mr. Bailey's view adopted, in contrast with the 1st ed. (1930), p. 101. Parry, *Law of Succession* (1937), pp. 113, 125, cites the article without dissent. Practitioners' books concur in reticence on the point.

² The warning on construing the 1925 legislation to be found in *Re Turner's Will Trusts* [1937] Ch. 15, led me to look at the Law of Property Act, 1922, s. 17 (2), where sect. 130 (2) of the Law of Property Act, 1925, originally appeared; however, the two sub-sections are identical in all the relevant parts.

1925.’ The sub-section, which is built on a framework of ‘certain expressions shall operate to create certain interests,’ can accordingly be written thus:—

Certain expressions	{	Expressions contained in an instrument coming into operation after 1925 which, in a will coming into operation before 1926, would have created an entailed interest in freehold land,
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shall operate { shall operate in equity

to create certain interests.	{	to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before 1926.
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Before 1926, the usual effect of a limitation of realty by will ‘to A and his issue’ was to give A an entail. The effect of the sub-section on such a limitation after 1925 was, until 1936, generally thought to be to give A the fee simple. Mr. Bailey, however, stated that this was incorrect and said that A took jointly in fee simple with such of his issue as were living at the relevant date. Mr. Bailey’s article, indeed, explored a number of other points, such as the effect of limitations ‘to A and his children,’ but the effect of a limitation ‘to A and his issue’ may not unfairly be said to be the kernel of the question: if the article is sound on this point, the rest is unassailable; if it is unsound, much, but by no means all, must fall. It is convenient and, I hope, permissible, to state Mr. Bailey’s argument syllogistically.

(1) *Major premise* : the sub-section says that a limitation of realty ‘to A and his issue’ after 1925 must be treated as if it were a limitation of personalty before 1926.

(2) *Minor premise* : in a limitation of personalty before 1926 in these terms, the words ‘and his issue’ were normally construed as words of purchase, conferring upon the issue an interest jointly with A.

(3) *Conclusion* : consequently realty thus limited after 1925 will normally be taken by A jointly with his issue.

If both premises are correct, the conclusion is indisputable. The minor premise is fully and authoritatively dealt with in the article in a way which leaves no room for cavil. The major premise, on the other hand, is scarcely discussed at all; despite the title of the article, there is no consideration of the meaning of the sub-section, but simply an assumption that it provides for informal limitations of realty to be treated as if they were informal limitations of personalty before 1926.³ It is assumed that

³ See *post*, p. 50. Instead of being called ‘The Law of Property Act, 1925, s. 130 (2),’ the article might well have been called ‘Construction of limitations “To A and his issue” and similar informal expressions.’

the sub-section not only regulates the estate or interest that passes but also, in many cases, the persons who are to take that estate. It is the purpose of this article to suggest that this assumed construction is unsound and that the sub-section deals solely with the estate or interest that passes and never with the persons who take it. Thus in a limitation of realty after 1925 'to A and his issue,' A having three children alive at the relevant date, Mr. Bailey and I are in agreement that by virtue of the sub-section a fee simple and not an entail would pass, but whereas he would give this fee simple to A and his children jointly, I would give it to A alone.⁴ The effect of the sub-section may conveniently be considered in two parts, dealing first with the limitations to which the sub-section applies and secondly with the way in which it operates.

1. LIMITATIONS TO WHICH THE SUB-SECTION APPLIES

As mentioned above, the essence of the sub-section is that it provides that certain expressions shall operate to create certain interests. This clearly shows that there is a preliminary question of construction to be solved in every case; the sub-section applies only to 'certain expressions,' and unless the expression used in the particular case in question falls within this category, the sub-section cannot apply. These 'certain expressions' are:—

'Expressions . . . which, in a will,⁵ or executory instrument coming into operation before [1926], would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument.'

Accordingly, when a limitation of realty after 1925 'to A and his issue' is encountered, the first question is whether the limitation is, or contains, a 'certain expression' as defined by the sub-section: if yes, the sub-section applies, if no, not.⁶ Now it cannot be said in the abstract whether or not these words would have created an entail in freehold land before 1926. If in the particular document the words 'and his issue' were used as words of limitation, they would indeed have created an entail, but if they were used as words of purchase they would not. The presumption, of course, was that since they concerned a limitation of realty, they were used as words of limitation;⁷ the presumption in the case of personalty

⁴ The report of *Re Compton* [1944] 2 All E. R. 255, at 259, 260 (see *post*, note 12), does not disclose whether the donee had issue living at the date of the gift, so that it cannot be said whether the apparent failure to urge Mr. Bailey's view was due to the facts making it immaterial or counsel's lack of faith in it.

⁵ The King's Printer's copy is punctuated thus, but this comma seems to have been wrongly inserted.

⁶ See *Re Brownlie* [1938] 4 All E. R. 54. This case, which is of no great general importance, has been unfortunately treated by the digests. It is, of course, omitted from the *soi disant* 'Complete Current Digest' published by the Incorporated Council for Law Reporting; the usefulness of this Digest is much diminished by the consistent omission of all mention of the All England Reports. Mews' Digest, which normally includes this series of Reports, appears to have overlooked the case in its 1938 volume. Only Butterworth's Yearly Digest, 1938, duly includes it (col. 384).

⁷ Bailey, pp. 70, 71.

was that they were words of purchase.⁸ Consequently the Court must first construe the limitation and discover the sense in which the words were used. This construction must necessarily be carried out according to the ordinary rules and cannot be affected by the sub-section, for not until the words have been construed can it be said whether the sub-section applies. If it is found that in the particular document in question the words ‘and his issue’ were used as words of purchase, then A will doubtless take jointly with his issue,⁹ not, indeed, by virtue of the sub-section, for *ex hypothesi* it has no application, but by virtue of the ordinary law. If, on the other hand, it is held that the words ‘and his issue’ have been used in the particular document in question as words of limitation, then the sub-section manifestly applies.

This is my first point of difference from Mr. Bailey, who clearly seems to regard the sub-section as applying even where the words ‘and his issue’ have been used as words of purchase. He of course points out that the sub-section has no application to *formal* words of limitation which would have sufficed to create an entail in a deed (not being an executory instrument) before 1926, *e.g.*, ‘to A in tail’ or ‘to A and the heirs of his body.’¹⁰ But subject to this exception, he makes it clear that in his view the sub-section applies to all informal expressions which could create an entail in a will before 1926, even if in the particular case in question the words in that expression are used in a sense which shows that they were intended to be words of purchase and not words of limitation.¹¹ Thus even if the context showed that the words ‘and his issue’ were used in the particular case not as words merely intended to show what estate A took, but as words conferring some interest on the issue themselves, Mr. Bailey regards the sub-section as applying. In such cases, it is true, there is no practical difference in the actual result between saying that by virtue of the ordinary law A and his issue share the property and saying that by virtue of the sub-section A and his issue share the property. But the importance of failing to observe the different technical means of achieving these similar results is that it obscures the existence of part of the next point, which is the crux of the matter.¹²

⁸ *Ibid.*, pp. 72—74.

⁹ See *ibid.*, 71, 76, 77: and refinements are possible, *e.g.*, that A should take for life and his issue after his death (*ibid.*).

¹⁰ *Ibid.*, 68.

¹¹ See especially, p. 81 *ad fin.* (‘Accordingly when a phrase . . . personalty by deed.’)

¹² A further limitation of the scope of the sub-section is indicated by *Re Compton* [1944] 2 All E. R. 255, at 260, where in a passage omitted from the reports at [1944] Ch. 378; 113 L. J. Ch. 219; 171 L. T. 96; 60 T. L. R. 485; 88 S. J. 262; [1944] W. N. 176, Cohen J. seems to have taken the view that the sub-section does not apply to expressions in executory instruments. The sub-section starts ‘Expressions contained in an instrument coming into operation after [1925] . . .’; the effect of *Re Compton* appears to be to add the words ‘(not being an executory instrument)’ after the word ‘instrument.’ No reasons for this view are reported, the wording of the sub-section (which shows that the draftsman was perfectly well able to add ‘not being an executory instrument’ when he wished) provides little support for it, and it has been criticised: see *Gower* (1944) 7 Mod. L. R. 233, 234. Yet it may well be sound: consider, for example, the difference

2. OPERATION OF THE SUB-SECTION

In a nutshell my argument may be put thus:—

The sub-section purports merely to affect the estate taken and not the persons who take it, and contains nothing to deprive the words 'and his issue' of the character of words of limitation which *ex hypothesi* all expressions falling within the scope of the sub-section must bear.

This argument may for convenience be considered under three heads, the correctness of any one of which would be fatal to Mr. Bailey's conclusions. These three heads are as follows:—

- (a) That the sub-section purports only to define what estate or interest passes and not who takes that estate.
- (b) That in a phrase such as 'to A and his issue,' only the words 'and his issue' fall within the sub-section, the words 'to A' not being affected by it.
- (c) That there is nothing in the sub-section to deprive the words 'and his issue' of the character of being words of limitation which *ex hypothesi* must have attached to them for the sub-section to apply.

(a) THE SUB-SECTION MERELY DEFINES WHAT ESTATE PASSES AND NOT WHO TAKES IT

On Mr. Bailey's construction, the sub-section may affect not only the estate passed, but also the persons who take it. A limitation of realty 'to A and his issue' which before 1926 gave A an entail is said by virtue of the sub-section to create a fee simple and to give it to A jointly with such of his issue as are alive at the relevant date. Yet there appears to be nothing in the sub-section to warrant the latter half of this construction. If indeed the sub-section had provided that expressions such as 'to A and his issue' should be construed *de novo*, without reference to the construction already put on them to bring them within the sub-section,¹³ as if they were expressions relating to personalty before 1926, Mr. Bailey's construction would have been inevitable. Mr. Bailey seems to assume that this is what the sub-section says. Thus he states that where an expression falls within the sub-section it "has the same effect . . . as though it were a bequest of personalty,"¹⁴ that it 'must now . . . be read as though the gift is a gift of personal property,'¹⁵ and that 'we are required to construe it . . . in the same manner as it was construed when inserted in a pre-1926 gift of personalty by deed.'¹⁶ But the words used in the sub-section are not of this width; they say nothing of

in the application of the rule in *Shelley's Case* (1581) 1 Co. Rep. 88 b, before 1926 to executory instruments and to other instruments; and the views expressed in Lewin, *Trusts* (14th ed., 1939), p. 69, appear to accord with those taken in *Re Compion*.

¹³ See *post*, p. 53.

¹⁴ P. 75.

¹⁵ P. 80.

¹⁶ P. 81; and see p. 68, last sentence of para. 1. See also Emmet, *Notes on Perusing Title* (12th ed., 1930—31), Vol. 2, p. 448, and contrast Vol. 1, p. 592.

construing any expressions in a particular way but merely that the expressions shall create certain interests. Questions of construction may affect many things besides the estate or interest passed, *e.g.*, the persons entitled, the time at which they take, the conditions subject to which they take and so on. The sub-section in terms refers only to one of the points affected by questions of construction, namely, the estate or interest which will pass; it seems illegitimate to assume that this is the equivalent of a direction that one of the other points affected by questions of construction, namely, the persons entitled, is to be controlled by the sub-section.

This conclusion, reached on the bare words of the sub-section, can be supported by reference to the context. The preceding sub-section is directed to authorising the creation of entails in personalty and to defining the expressions which will suffice to create an entailed interest in any property. In sub-sect. (2) the draftsman's object is manifestly to lay down the effect of not using these expressions. It would indeed be surprising if in such surroundings the draftsman had inserted provisions dealing not with the bare question of the interest to be created, but with the whole question of construction and in particular the persons who should take.¹⁷

(b) THE SUB-SECTION APPLIES ONLY TO THE WORDS 'AND HIS ISSUE' AND NOT TO THE WORDS 'TO A.'

Even if the last contention is wrong and the sub-section alters the general construction to be put on certain words, it is at least arguable that where the expression concerned is 'to A and his issue,' only the words 'and his issue' fall within the scope of the sub-section, so that the sub-section cannot have the effect of conferring any estate or interest on anyone except A. The phrase 'to A and his issue' may be split into the words 'to A,' which are manifestly words of purchase, and the words 'and his issue,' which in any expression to which the sub-section applies (see (1) above) must necessarily be words of limitation. In other words, before 1926 the expression which created the entail was 'and his issue' and the phrase 'to A' merely showed who was to have that entail. It is

¹⁷ It may at first sight seem odd that the sub-section should be drafted referentially instead of absolutely; the draftsman, it might be urged, should have stated in direct terms what interests would be taken instead of using similar limitations of personalty before 1926 as his touchstone for the estate taken today. One explanation, of course, is that this is merely another example of that tortuosity of mind which some regard as the inherent vice of modern draftsmanship. Yet without descending to such criticism, the referential drafting may be explained in the following way. If the draftsman had simply said that the result of using informal words would be to create 'absolute or fee simple interests,' there might have been some doubt about the effect of limitations defeasible by condition subsequent or determinable interests: cf. *Re Chardon* [1928] Ch. 464, at 469. In order to cover such cases, he added suitable words ('or other interests') and then had to find some convenient expression to confine these added words within due limits. Faced with such a situation, a definition by reference to interests in personalty before 1926 offered a convenient solution; it is not easy to find another as good. *Jenks' Digest of English Civil Law* (3rd ed., 1938), p. 652, indeed states that 'The words "fee simple or other interests" are misleading,' but it is perhaps permissible to dissent.

of course true that an entail could not exist *in vacuo* and the words 'and his issue' used by themselves might well be mere nonsense, creating no estate; words of limitation coupled to no words of purchase would normally be insensible. Yet it is indisputable that a limitation simply 'to A' would generally give A no more than a life estate, and that what brought an entail into being was the addition of some words such as 'and his issue.' When, therefore, the sub-section refers to 'expressions . . . which . . . would have created an entailed interest' (and it is to these alone that it applies), a somewhat verbalistic case can be made for asserting that it is to the words 'and his issue' alone that the sub-section applies. These words, it says, shall operate 'to create absolute, fee simple or other interests corresponding to those . . .' On such a basis an interpretation of the sub-section which postulates that it merely lays down what estate or interest A takes seems simple and inevitable, while one which states that A will take jointly with any of his issue alive at the relevant time seems the reverse.

(c) THE WORDS 'AND HIS ISSUE' RETAIN THAT CHARACTER OF BEING WORDS OF LIMITATION WHICH EX HYPOTHESI THEY BEAR

It has been pointed out under (1) above that the sub-section cannot affect a limitation 'to A and his issue' until it has been settled that in the particular case in question the words 'and his issue' have been used as words of limitation. Taking, then, a case where this preliminary point has been thus settled, the sub-section provides that 'and his issue' shall create absolute, fee simple or other interests corresponding to those which would have been created before 1926 by 'similar expressions' had the property been personalty. The question, therefore, is what is a 'similar expression' to 'and his issue' in a case *where it has been settled that those words have been used as words of limitation*. The answer seems clear: 'and his issue' or equivalent words *used as words of limitation*. Although the word 'expression,' like so many words, may bear several meanings, in this context it can scarcely be said that two expressions are 'similar' if they each contain the same words, but those words are used in different senses. Is a gift of 'all my fees' in one will a 'similar expression' to a gift of 'all my fees' in another will? If both testators are landowners who have not otherwise disposed of their lands held in fee simple, yes; but if one is such a landowner and the other a professional man such as a surgeon or architect owning no land, surely no. Is a gift 'to A and his family' in one will similar to a gift 'to A and his family' in another will? Surely it must depend upon the meaning put upon 'family'; in the first gift the context may have made it clear that 'family' meant A's wife and children, in the second it may be manifest that 'family' has been used synonymously with 'issue.' If I call X a 'stout fellow' and on another occasion call Y a 'stout fellow,' have I expressed myself similarly about them if the context shows that I am commending X as a stalwart friend and condemning Y as a gluttonous don? Logicians know well the 'ambiguous

middle': thus 'all metals are elements; brass is a metal and is therefore an element,' and 'every good law should be obeyed; the law of gravitation is a good law, and therefore should be obeyed.' One word used in two differing senses may form the foundation of much false reasoning.

Mere verbal similarity, in short, is not enough; two expressions can properly be said to be 'similar' within the meaning of the sub-section only if they bear a similar meaning. Thus, to make a delicate approach towards the precise point in question, 'to A and his issue, by which I mean his descendants *ad infinitum*' can hardly be said to be a similar expression to 'to A and his issue, by which I mean those of his descendants who are now living': and, to advance to the heart of the matter, neither can 'to A and his issue' be said to be a similar expression to 'to A and his issue' if the word 'issue' has been used in different senses in the two expressions. It has been shown above that in any case falling within the sub-section the Court must have held that the words 'and his issue' were used as words of limitation. Consequently the statutory direction in such a case to have regard to the estates or interests which would have been created in personalty by similar expressions before 1926 must refer to expressions where the words 'and his issue' were similarly used as words of limitation and not as words of purchase; and it is common ground that such words used as words of limitation give no interest to the issue but merely an absolute interest to A. It is true that a gift 'to A and his issue' in a limitation of personalty before 1926 would normally have been construed as containing words of purchase which gave an absolute interest to A and his issue living at the relevant date, but to argue that a similar limitation of realty after 1925 will have the same effect even though 'and his issue' have been used as words of limitation is to embrace the proposition that 'issue' in the sense of 'issue *ad infinitum*' is an expression similar to 'issue' in the sense of 'issue now living.' When the meaning of an expression has been determined and there is a statutory direction that it shall create the same interests as 'similar expressions' would in given circumstances, there seems to be no justification for taking as a similar expression one that is similar in words but dissimilar in meaning.

There is one final point of minor importance. Mr. Bailey suggests¹⁸ that the word 'therein' just before the end of the sub-section 'presumably . . . refers to the "instrument" which one is attempting to construe,' but that 'on the other hand, it may conceivably relate to the supposed "deed" which is mentioned in one of the intervening subsidiary clauses.' Both these suggestions seem disputable, and, indeed, Mr. Bailey says that the latter 'appears to have little to commend it.'¹⁹ For one thing, it is usual after mentioning an 'instrument' or 'deed' to refer not to the interests created 'therein' but to those created 'thereby';

¹⁸ P. 82; and see p. 68, n. 6.

¹⁹ P. 82.

for another, it seems odd that the draftsman should go so far back in the sub-section for his reference. A third possibility, which is not mentioned by Mr. Bailey but avoids both these difficulties, is that 'therein' refers back to 'personal estate.' It is quite appropriate after mentioning 'personal estate' to refer to the interests created 'therein,' and there is a natural preference for the nearest antecedent; instead of going back ninety-two or forty-nine words, it is only necessary to go back five. It is true that 'personal estate' occurs in a parenthetical phrase, but this is easily explicable on the grounds of elegance. A draftsman who wrote 'corresponding to those which would have been created in personal estate by similar expressions before the commencement of this Act if the property affected had been personal estate' might well have sought to avoid repetition by turning his phrase and rewriting the concluding words as they now stand, namely, 'corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.'

SUMMARY

The conclusions reached in this article may be summarised as follows:—

1. Mr. Bailey's article at (1936) 6 Camb. L. J. 67 gives an admirable account of the rules relating to limitations of personality before 1926 'to A and his issue' and certain other expressions, but is unsound on the effect of the Law of Property Act, 1925, s. 130 (2).

2. If property is limited after 1925 'to A and his issue,' the Court must first construe the limitation to discover whether the words 'and his issue' have been used in the particular case as words of limitation or words of purchase. In performing this task, the usual canons of construction will apply, and in default of any contrary indication the presumption will be that the words are words of limitation if the property concerned is realty, words of purchase if the property is personality.

3. If the words are held to be words of purchase, the sub-section can have no application and the operation of the limitation cannot be affected by it. If, on the other hand, the words are held to be words of limitation, the sub-section applies.

4. Where the sub-section applies, it merely prescribes the estate or interest taken by A and does not confer any interest upon the issue; the estate or interest will normally be a fee simple in the case of realty and an absolute interest in the case of personality. The reasons for this are—

- (a) that the sub-section purports to do no more than define the interest to be taken and does not purport to deal with anything else; it is wrong to say that under the sub-section the limitation 'must be construed as if it were a limitation of personality';
- (b) that the sub-section applies only to those words in a limitation which form the words of limitation and not to those words

which operate as words of purchase; thus in the expression ‘ to A and his issue,’ the sub-section applies only to the last three words;

- (c) that since the only words which come within the sub-section are words of limitation, the ‘ similar expressions ’ referred to in the sub-section must also be words of limitation and so cannot operate as words of purchase; like must be compared with like.

5. As a matter of grammar, ‘ therein ’ in the sub-section refers to ‘ personal estate ’ and not to ‘ instrument ’ or ‘ deed.’

THE WALTHAM BLACK ACT

A STUDY OF THE LEGISLATIVE ATTITUDE TOWARDS CRIME
IN THE EIGHTEENTH CENTURY

L. RADZINOWICZ

[NOTE.—Dr. Radzinowicz's article is a short part of the first chapter of a great work on which he is engaged and which traces the development of English criminal law to be found in all Parliamentary papers and other sources from the year 1760 onwards. The immense amount of labour involved in this has been greatly facilitated by a generous grant from the Pilgrim Trust, of which Lord Macmillan is chairman. Moreover, the interest which members of our highest appellate tribunal have displayed in the importance of Dr. Radzinowicz's project was evinced by the establishment in 1944 of an advisory committee, of which the Viscount Maugham is chairman, and of which Lord Wright and Lord Simonds are members; the other members are Sir Arnold McNair, Professor Hollond, Mr. J. W. C. Turner and Professor Winfield. Nothing on a similar scale has previously been attempted in the history of our criminal law, and we may confidently hope that, when it is completed, it will remove the reproach that we have had a talent of great value in our possession, and have done nothing with it but wrap it in a napkin.—ED., C.L.J.]

I

IN 1723 a statute was enacted (9 Geo. 1, c. 22) bearing the following title: 'An Act for the more effectual punishing wicked and evil disposed Persons going armed in Disguise, and doing Injuries and Violences to the Persons and Properties of His Majesty's Subjects, and for the more speedy bringing the Offenders to Justice.' This statute is commonly known as the Waltham Black Act—a name indicative of the local circumstances which led to its being passed. According to Blackstone,¹ the statute was enacted to stop the depredations which were being committed near Waltham, in Hampshire, by persons in disguise or with their faces blacked; he also observes that the technique of these offenders, who operated in the forests of Waltham, seemed to have been modelled on the criminal activities of the famous band of Roberdsmen, or followers of Robert, or Robin, Hood, who committed great outrages in the reign of Richard the First on the border of England and Scotland.² An

¹ 4 *Comm.* Christian's ed., (1830), p. 245.

² The activities of Robert Hood and his followers gave rise to so many important penal statutes that Coke, 3 *Inst.* 197, devotes a short chapter to them, which he opens with the following picturesque paragraph: 'It is an English Proverbe; That many men talk of Robin Hood, that never shot in his bow: and because the statutes and records hereafter

interesting reference to the Waltham Black Act occurs in Gilbert White's '*The Natural History and Antiquities of Selborne in the County of Southampton*,'³ and it is significant that while Blackstone cautiously refrains from expressing any opinion on this statute, White says that it is 'severe and sanguinary' and that 'it comprehends more felonies than any law that ever was framed before.' Actually, no other single statute passed during the eighteenth century equalled 9 Geo. I, c. 22, in severity, and none appointed the punishment of death in so many cases. The Waltham Black Act may, in fact, be looked upon as a kind of 'ideological index' to the large body of laws based on the death penalty which were in force in England at the end of the eighteenth, and the beginning of the nineteenth, centuries. The main features peculiar to this Act reappear, sometimes in a modified form, in almost all the other capital statutes of the period. Thus, an accurate knowledge of the Waltham Black Act is essential if the structure and guiding principles of the capital enactments in general are to be understood; moreover, the fact that the struggle for the repeal of this extraordinary statute was both intense and prolonged, further enhances the symptomatic importance of the Act, which might otherwise seem to be but an obscure enactment designed to meet a purely local emergency.

II

OFFENDERS DEALT WITH UNDER THE ACT

Persons (1) armed and having their faces blacked, (2) armed and otherwise disguised; persons (3) having their faces blacked, (4) otherwise disguised; (5) any other person or persons; (6) principals in the second degree; (7) accessories after the fact (in certain cases). This shows clearly what an extraordinarily wide range of persons came under the Act. For even if none of the aggravating conditions set out

mentioned cannot well be understood, unless it be known what this Robin Hood was that hath raised a name to these kinde of men called Roberdsmen, his followers, we will describe him.' Coke represents him as being nothing more than a brigand who lived 'in woods and deserts, by robbery, burning of houses, felony, waste and spoile, and principally by and with vagabonds, idle wanderers, night walkers, and draw-latches: . . . And albeit he lived in Yorkshire, yet men of his quality took their denomination of him and were called Roberdsmen throughout all England.' This description is somewhat misleading, for it takes no account of the social background of the criminality of Hood and his followers. See, on this subject, C. J. Ribton-Turner, *History of Vagrants and Vagrancy and Beggars and Begging* (1887), pp. 30—31.

³ 'Though large herds of deer do much harm to the neighbourhood, yet the injury to the morals of the people is of more moment than the loss of their crops. The temptation is irresistible, for most men are sportsmen by constitution: and there is such an inherent spirit for hunting in human nature, as scarce any inhibitions can restrain. Hence, towards the beginning of this century, all this country was wild about deer-stealing. Unless he was a *hunter*, as they affected to call themselves, no young person was allowed to be possessed of manhood or gallantry. The *Waltham blacks* at length committed such enormities, that government was forced to interfere with that severe and sanguinary act called the *black Act*, which now comprehends more felonies than any law that ever was framed before. And, therefore, a late bishop of Winchester (Dr. Hoadly) when urged to stock *Waltham Chase*, refused, from a motive worthy of a prelate, replying that "It had done mischief enough already." Bell's ed. of 1877, vol. I, pp. 19—20.

under classes 1—4 obtained in a certain case, the delinquent might still be prosecuted and capitally convicted under class 5. Such a wide interpretation was unanimously adopted by the leading authorities. Hawkins, for instance, referring to the Black Act offence of wilfully and maliciously shooting any person, states that 'this clause of the Act is entire and independent, and has no relation whatever to that part of the Act relating to the offenders being armed and disguised.'⁴ A similar view was taken in the well-known case of Arnold, who was convicted of shooting at Lord Onslow; though his face was not blacked, and he was not otherwise disguised at the time of his crime, he was tried and convicted under the Black Act.⁵

Highly instructive is the history of class (6). A principal in the second degree was at that time defined as a person who was present when the principal in the first degree perpetrated the crime, aiding and abetting its commission.⁶ Doubts as to whether the Waltham Act could be made applicable to this category of offenders were admittedly justified, however. For none of its numerous provisions refers specifically to principals in the second degree, the Act merely stipulating that 'every person *so offending* (our italics), and being convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.' It could be asserted therefore, that these words were intended to relate exclusively to the main perpetrators of any of the numerous crimes dealt with under the Act, and that all other persons involved in their commission were not to be deprived of benefit of clergy and might thus escape capital punishment, even if found guilty. Those who inclined towards this view could invoke the corroborative opinion of many high authorities, as well as the precedent of settled judicial practice, that capital statutes should be construed very strictly and in favour of the accused. Thus, Hale wrote: 'Where any statute subsequent to 25 E. 3 *cap.* 4, hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem mitæ et privilegii clericalis* such statutes are construed literally and strictly.'⁷ Blackstone held the same opinion, and framed the following subtle and ingenious formula respecting the punishment of principals in the second degree within the non-clergyable capital statutes: 'That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary), a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, that where

⁴ 1 P. C. (1795), p. 630, sect. 4.

⁵ State Trials, vol. XVI, 1812, T. B. Howell's ed., p. 744. This unique collection has not yet been fully exploited, though it is hardly possible to over-estimate its value from a broader historical as well as legal point of view. See, on this subject, the delightful study of Leslie Stephen: 'The State Trials,' in *Hours in a Library* (1892), vol. III, pp. 306—338.

⁶ Blackstone, 4 *Comm.* 34.

⁷ 2 P. C. Emlyn's ed. (1736), p. 335.

it is only taken away from the *person committing* the offence,⁸ (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally.'⁹ The most eloquent and persistent eighteenth century exponent of this restrictive interpretation was Foster, whom De Grey C.J. described as 'the Magna Charta of liberty of persons as well as of fortune.'¹⁰ Foster attempted to justify this doctrine by a comprehensive and perspicacious examination of the leading statutes and judicial decisions, and endeavoured to put it into practice when he tried a well known case under the Waltham Black Act.¹¹ However, the opinions of these great authorities were set aside, and the provisions of the Black Act so interpreted as to cover principals in the second as well as in the first degree. This decision was first given in *Midwinter and Sims*. It was tried at the Lent Assizes for the County of Gloucester in 1749 before Foster J., who was inclined to take an opposite view, but when the case was referred to all the Judges, Foster's judgment was overruled,¹² and sentence of death was passed on Sims,¹³ who was a principal in the second degree¹⁴ to the crime perpetrated by Midwinter. But it was mainly owing to the *Granger's Case*—known as the *Coal-Heavers' Case*—that the broad construction thus put upon the Waltham Black Act became firmly established, and that it subsequently determined the ruling in a series of similar cases under the same statute.¹⁵ The Judges to whom the case was referred for consideration based their decision on the grounds that: 'This offence was a *new-created felony*; and therefore, it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law. The statute does not merely take away the privilege of clergy from an offence which was before known, but ordains that those

⁸ This expression may be considered as the equivalent of the phrase, quoted above, from the Waltham Black Act, *i.e.*, 'every person so offending.'

⁹ 4 *Comm.* 373.

¹⁰ E. Foss, *A Biographical Dictionary of the Judges of England* (1870), p. 279. In it Foss also quotes the following passage from Churchill's 'Rosciad':—

'Each judge was true and steady to his trust,
'As Mansfield wise, and as old Foster just.'

¹¹ For Foster's views on this subject, see below, footnote ¹⁴.

¹² 1 Leach, 66—69, note (a). This decision was also endorsed by Lord Mansfield, in *R. v. John Royce* (1767) 4 Burr. 2075.

¹³ Both Sims and Midwinter were afterwards reprieved.

¹⁴ Michael Dodson, a nephew of Foster and himself a lawyer, appended to his edition (3rd) of Foster's treatise, a memorandum composed by the latter when he was trying this case, embodying his reasons for not concurring with all the other Judges; see *Crown Law* (1792), pp. 415—430. This memorandum,—surveying the legal position of principals in the second degree under the main statutes prescribing capital punishment without benefit of clergy,—constitutes a masterly exposition of this intricate branch of English criminal law up to the middle of the eighteenth century. As regards the point at issue, according to Dodson, Foster's exposition amounted 'to a demonstration, that all those learned judges have mistaken the law. *Sims* might deserve as severe a punishment as *Midwinter*; but no punishment which is not authorised by law ought to be inflicted on any man, and the point is, whether the law in this case hath provided the same punishment for both.' *Ibid.*, pp. iv—v.

¹⁵ *The Coal-Heavers' Case* (1768) 1 Leach, 64.

who are guilty¹⁶ of the thing prohibited by it, shall be adjudged felons without benefit of clergy; and therefore, by a necessary implication, makes all the procurers and abettors of it principals or accessories, upon the same circumstances which will make them such in a felony by the common law; and it hath been long settled that all those who are present aiding and abetting when a felony is committed, are principals in the second degree.' In the *Coal-Heavers' Case*, sentence of death was passed on all the seven men who took part in the commission of the offence, although only four of them actually fired shots, and the other three, while present, made no use of any fire-arms themselves.¹⁷ On July 26, 1768, all seven were executed.¹⁸ When evaluating the ancient treatises on criminal law, Stephens sees in Hale's work an outstanding contribution to the subject, unfortunately 'marred by the endless technicalities about principal and accessory, about benefit of clergy, about the precise interpretation of obscure phrases in statutes.'¹⁹ Professor Winfield considers this objection ill-founded for, as he puts it, 'this criticism hardly takes account of the importances of these topics in Hale's time.'²⁰ Judging from the *Coal-Heavers' Case*, it can hardly be an exaggeration to assert that the very lives of offenders, even at the end of the eighteenth century, often largely depended on the way in which these 'obscure phrases in statutes' were interpreted by the Courts.

The already wide range of persons who could be capitally convicted under the Black Act was still further extended by the stipulation that in certain cases even an accessory after the fact, *i.e.*, a person who knowingly receives, relieves, comforts, or assists the felon, was to suffer the death penalty.²¹ Almost all the provisions of the Black Act lay down that offenders not surrendering themselves pursuant to an order of the King in Council should also be deprived of benefit of clergy, together with those who 'after the times appointed as aforesaid²² for the surrender of any person so charged upon oath with any of the offences aforesaid be expired, conceal, aid, abet, or succour such person, knowing him to have been so charged as aforesaid, and to have been required to surrender himself by such order or orders as aforesaid, being lawfully convicted thereof.'

¹⁶ By using the expression 'who are guilty'—unknown to the statute—the Judges most probably intended to indicate what according to them was the actual meaning of the expression 'every person so offending' occurring in the statute.

¹⁷ In his reference to this case, Dodson was right in observing that 'This case is exactly similar to the case of *Midwinter and Sims*; and if Mr. Justice Foster's opinion in that case be well-founded, namely, that the benefit of clergy is taken away only from persons actually committing the offence, it follows necessarily, that three of these men suffered a more severe punishment than the law authorizeth.' Preface to Foster's *Crown Law* (1792), p. vii.

¹⁸ The ruling given in the *Coal-Heavers' Case* had also had a direct bearing on certain essential rules of criminal procedure and made the operation of the Black Act still more stringent. See, on this point, below, p. 68.

¹⁹ *History of Criminal Law*, vol. II, p. 212.

²⁰ *The Chief Sources of English Legal History* (1925), p. 327.

²¹ See class (7) at p. 57, above.

²² The time period specified by the statute is forty days.

Having thus ascertained what categories of offenders could be tried under this extraordinary penal statute, we shall now consider what offences they had to commit in order to be liable under its provisions.

III

OFFENCES DEALT WITH UNDER THE ACT

CLASS A

The appearance of persons armed, with their faces blacked, or otherwise disguised in:—

- | | |
|--|---|
| (1) High Roads, (2) Open Heaths, (3) Commons, (4) Downs; | |
| (5) (a) Forests, | } where any deer have been or shall be usually kept. |
| (b) Chases, | |
| (c) Parks, | |
| (d) Paddocks, | |
| (e) Grounds enclosed by any wall, pale or other fence. | |
| (6) (a) Warrens, | { where hares or conies have been or shall be usually kept. |
| (b) Any other places | |

The simple appearance, without any other crime being committed or even attempted, by anyone coming under one of the three groups of offenders, in any of the six places set out above, constituted an offence under the Waltham Black Act, for which a convicted offender was liable to be sentenced to death without benefit of clergy. Such is the actual meaning of this remarkable provision, and such is the construction which was put upon it by the highest judicial authorities.²³ The following case—tried by Lord Hardwicke, when Chief Justice—may be quoted in this connection; it was brought to the knowledge of an important Parliamentary Committee in 1819 by Sir Archibald Macdonald, formerly Solicitor-General and Lord Chief Baron of the Court of Exchequer.²⁴ The establishment of turnpikes at first provoked much resentment, and in Herefordshire a great number of persons assembled together, masked and disguised. They were opposed on the road by the magistrates, who apprehended them before they had even attempted to commit any other offence in connection with the turnpike; however, it came out in evidence that their object had been to pull down the turnpike gate. Lord Hardwicke, who tried these men under the Black Act, told the jury ‘that every crime specified in that Act, was a distinct and separate crime;

²³ The several facts mentioned in the Act are not to be taken as being parts of the same offence, but are each of them a separate offence. *R. v. Baylis and Reynolds* (1736) Cas. T. Hard. 292. It would seem that Lord Hardwicke was wrong in interpreting this clause of the Act as if it was irrelevant whether or not the persons were armed. See *ibid.* note 1.

²⁴ ‘Report from the Select Committee on Criminal Laws’ (1819), 585, in *Parliamentary Papers* (1819), vol. VIII, p. 1; *Minutes of Evidence*, pp. 49—50.

they had no connection one with the other, but although it might be right enough to let in the evidence of the intent, yet that which the jury had to look to was *entirely independent of that circumstance* (our italics). The words of the statute were, "appearing with a black face or otherwise disguised upon the road": Did the prisoners or not so appear?' Sir Archibald Macdonald added when describing this case that the men were convicted and ordered to be executed on that point only, but that he was not aware whether they were actually put to death. Additional information on the case is available in the extremely thorough and detailed—though not sufficiently critical—biography of Lord Hardwicke, by the learned Mr. Philip C. Yorke, himself a member of this distinguished family.²⁵ Yorke tells how the case came before Lord Hardwicke on July 5, 1736, and how two men implicated in the offence were sentenced capitally, one being later reprieved, but the other, called Reynolds, being put to death. Yorke quotes from the *Gentleman's Magazine* the following appalling circumstances which accompanied this execution, significantly adding that they were described without a word of indignation or comment: 'Monday 26 [July 1736] one, Reynolds, . . . was hanged at Tyburn. He was cut down by the executioner as usual, but as the coffin was fastening, he thrust back the lid, upon which the executioner would have tied him up again, but the mob prevented it, and carried him to a house where he vomitted three pints of blood, but on giving him a glass of wine, he died.'²⁶

CLASS B

OFFENCES AGAINST RED OR FALLOW DEER

Unlawfully (1) hunting, (2) wounding, (3) killing, (4) destroying, (5) stealing deer; (6) 1—5 if committed in any places in any of the King's forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed, where deer have been or shall be usually kept.

The offences 1—5 were first made felonies by 1 Hen. VII, c. 1, which was afterwards superseded by the more comprehensive and much more severe provisions of the Waltham Black Act.²⁷ These five offences had to be committed by persons who were armed, had their faces blacked, or were otherwise disguised; but if the same offences were committed in any of the King's forests or chases (point 6) it was immaterial whether

²⁵ *The Life and Correspondence of Philip Yorke Earl of Hardwicke, Lord High Chancellor of Great Britain*, by Philip C. Yorke (1913), 3 vols. Reference is made to vol. I, p. 132.

²⁶ *Gentleman's Magazine* (1736), vol. VI, p. 422.

²⁷ For an instructive analysis of 1 Hen. VII, c. 1, see Coke, 3 *Inst.* 74—77. It is also interesting to note that according to Coke this statute compares disadvantageously with what he calls the good old statutes of *carta de foresta*. He refers to 1 Hen. VII, c. 1 as 'this new and ill penned law' and points out that it was owing to its excessive severity that the Judges interpreted it 'strictly,' putting upon it what he calls 'a favourable construction.' Obviously his main objections *a fortiori* may be directed against the Black Act.

the offenders were armed and disguised or not. It should also be mentioned that according to East—and to our knowledge his opinion on this point was not contradicted—‘though the statute only mentions red or fallow deer, yet the cross breeds, such as what is called a bastard menald, bred from a menald buck and a fallow doe, are within the Act.’²⁸ This clause of the Waltham Black Act protecting deer was ultimately repealed by a liberal judicial decision. The circumstances were as follows: in 1786 a statute was passed²⁹ repealing a great number of previously enacted laws concerning punishment of deer-stealers, many of which had become ineffectual. This Act also stipulated that the first offence of stealing, etc., any red or fallow deer should only be punished by a fine, but that the second offence should be considered a felony, and be punished by transportation for seven years. However, although this notable change in the scale of punishment directly affected some of the offences against deer which came under the relevant clause of the Waltham Black Act,³⁰ *the latter was not included in the list of statutes repealed by* 16 Geo. III, c. 30. Nevertheless, in the case of *John Davis*, all the twelve Judges unanimously agreed that 16 Geo. III, c. 30, amounted to a repeal of this clause of the Black Act, on the ground that when a statute makes an offence a felony punishable by death without clergy, and a subsequent statute orders a milder punishment for the same offence, the latter statute virtually repeals so much of the former as relates to the offence in question.³¹

CLASS C

THEFT OF HARES, CONIES AND FISH

Robbing of (1) hares, (2) conies, (3) any warren or place where conies or hares are usually kept; (4) stealing or taking away any fish out of any river or pond.

These offences again had to be committed by persons armed, with faces blacked, or otherwise disguised, the penalty again being death without benefit of clergy. If, however, the offender was neither armed nor disguised, some of these offences, *e.g.*, stealing conies or fish, were declared not to be capital felonies and were punished only by short terms of imprisonment or by fines, even if committed at night time.³²

CLASS D

THE OFFENCE OF DESTROYING THE HEADS OF FISH-PONDS

(1) Unlawfully and maliciously breaking down the mound of any fish-pond whereby the fish shall be (a) lost, or (b) destroyed.

²⁸ 2 P. C. (1803), pp. 609—610.

²⁹ 16 Geo. III, c. 30.

³⁰ If the offence is committed by persons unarmed.

³¹ *R. v. John Davis* (1783) 1 Leach, 271.

³² See, on this subject. 3 Jac. I, c. 13, and 22 & 23 Car. II, c. 25, s. 7.

This offence could be committed by any person, not necessarily armed or disguised. The purpose of the clause was to protect property owners from the malicious activities of persons whose object was not to steal property but to injure the proprietor by its destruction, thus satisfying their feelings of resentment or vengeance.³³ It is hardly necessary to emphasize the extraordinary harshness of this provision of the Waltham Black Act, both in comparison with present legal standards, and with the eighteenth century English criminal laws, although the latter abounded in excessive and cruel punishments. Its highly repressive character is revealed still better when it is contrasted with the old law which it superseded, and with some contemporary enactments dealing with almost identical offences. The Black Act had superseded 37 Hen. VIII, c. 6, s. 4, by which offenders might be fined, and were also liable to pay treble damages to the injured party, to be recovered by an action of trespass. The Black Act may also be compared with 5 Eliz. c. 21, which was still in force when the former was enacted, and which related to the similar offence of breaking the heads or dams of ponds and stealing fish. The Act of Elizabeth provided that the offender found guilty under its provisions should suffer imprisonment for three months and pay the injured party treble damages, and also imposed on him the obligation, after the expiration of his sentence, of finding his sureties for good behaviour for another seven years, failing which he was to remain in prison until such sureties should be found. Neither 37 Hen. VIII, c. 6, nor 5 Eliz. c. 21, originated in a period of English history remarkable for leniency in the administration of criminal justice, yet both were wiser and more humane than the Black Act. It is mainly owing to this clause that the Black Act has found a place in the great historical works on the eighteenth century, its capital provision for breaking down the mound of a fish-pond being quoted as a classical illustration of how primitive, irrational and inhuman were the criminal laws then in force.³⁴

CLASS E

THE OFFENCE OF DESTROYING TREES

- | | | |
|---|---|--|
| (1) Unlawfully and maliciously
to cut down | { | (a) any trees planted in any avenue,
or (b) growing in any garden,
orchard or plantation—for or-
nament, shelter or profit. |
| (2) or otherwise destroy | | |

³³ For the very strict interpretation put upon this clause, see the case of *Thomas Ross*, tried in 1800 before Chambre J. and afterwards referred to all the Judges for their consideration. In this case it was established that the object of the prisoners was to steal the fish and not to let them escape through the breach in the mound; the Judges therefore concluded that the conviction was wrong, as the clause against breaking the heads, etc. of ponds did not extend to cases where the purpose of the party was to steal the fish, which were protected by another clause of the Act, and that even if the offence proved had been originally within the Black Act it was virtually taken out of it by the subsequent statute of 5 Geo. III, c. 14. Russell, *Crimes and Misdemeanours* (1819) vol. II, p. 1711.

³⁴ See, for instance, Lecky, *History of England in the Eighteenth Century* (1903), vol. VII, p. 317.

The fact that this is one of the most penal clauses of the Black Act³⁵ most probably accounts for the tendency of the Courts to have recourse to considerable subtleties to avoid putting it in operation. Thus we have it on the authority of Sir James Mackintosh that the expression 'cut down or destroy' was often interpreted in the sense that if a tree could be engrafted again it was not destroyed, but that to come within the meaning of this Act it must be utterly rooted up. He quoted the case of a man who out of resentment against his master cut down five hundred trees in his nursery; the Court decided that wherever the trees could be engrafted again, they were not destroyed, and therefore that the offence could not be brought within the Black Act.³⁶ All the Courts did not put so lenient a construction on this provision; thus William Potter, a thirty years old agricultural labourer, married, and with a family, cut down an orchard of young trees which a neighbouring miller had planted three years before and carefully cultivated. Committed by Robert Torin, the magistrate, and tried before Heath J. in August, 1814, at the Essex County Assizes, he was indicted under the relevant clause of the Waltham Black Act, and sentenced to death. Five years later, the committing magistrate, Robert Torin, stated before the 1819 Committee that the sentence of death 'rather struck us all with surprise; the miller, the clergyman of the parish, and several of the inhabitants, presented a petition, and I signed my name to it.'³⁷ This petition failed to achieve its purpose and William Potter was executed. Commenting upon this case, the 1819 Committee expressed the opinion that 'Penal laws are sometimes called into activity after long disuse, and in cases where their very existence may be unknown to the best informed part of the community; malicious prosecutors set them in motion; a mistaken administration of the Law may apply them to purposes for which they were not intended, and which they are calculated more to defeat than to promote.'³⁸

³⁵ Though the statute uses the word 'trees' in the plural, and other Acts relating to similar offences, such as 6 Geo. III, c. 36, or 6 Geo. III, c. 48, speak of 'tree or trees,' it was maintained that the expression in the Black Act might also be construed *singulariter*. The reason for this construction was the same as caused it to be considered that though 22 & 23 Car. II, c. 7, s. 2, made it a felony to burn any *ricks* or *stacks* of corn, etc. in the night, yet the burning of only *one rick*, etc., was within the statute. Russell, *Crimes and Misdemeanours* (1819), vol. II, p. 1702.

³⁶ See 'Report from the Select Committee on Criminal Laws' (1819), 585, in *Parliamentary Papers*, vol. VIII, p. 1; Minutes of Evidence, p. 45.

³⁷ *Ibid.*, p. 87. This petition, addressed to the Secretary of State at the Home Office, Lord Sidmouth, contained a paragraph which throws a vivid light on an important jurisprudential and social aspect of certain capital statutes to which no adequate attention was paid, particularly by those mainly responsible for the framing of such laws: 'I beg leave to suggest to your lordship, that I am well assured, when he committed the act for which he stands condemned, (viz., cutting down the trees,) he was not sensible of the heinousness of the offence, or aware of the punishment which awaited it; and I believe very few of the lower orders of the people are acquainted with the terms of the Black Act.' *Ibid.*, p. 88.

³⁸ *Ibid.*, p. 6. Accordingly, the Committee recommended that penal laws that had not been implemented in Middlesex for more than a century, in the counties round London for sixty years, and in the extensive district of the Western circuit for fifty, might safely

CLASS F

OFFENCES AGAINST CATTLE

Unlawfully and maliciously (1) killing, (2) maiming, (3) wounding any cattle.

The wide scope of this clause is obvious from its wording, which is characteristic of the whole statute. The three offences might be committed by any person, or persons, whether armed or disguised, or not. It should be noted that the term 'any cattle' was to be interpreted in its most generic form so as to include all possible species of cattle. Thus in *R. v. John Porty* the prisoner was convicted on an indictment under this clause of killing a mare and a colt. An attempt was made to prove that the word 'cattle' did not include horses, mares, and colts. Several statutes were quoted in support such as 3 & 4 Edw. VI, c. 19, and 31 Geo. II, c. 40, which specifically enumerated different sorts of animals, as well as other statutes which, like 12 Car. II, c. 4, and 22 Car. II, c. 13, explicitly excluded 'horses and mares' from the word 'cattle.' But the Judges unanimously decided that the Black Act must be considered as enlarging the description of the felony laid down by 22 & 23 Car. II, c. 7, and it was accordingly agreed that judgment of death should be passed on the prisoner at the next assizes.³⁹ It is also interesting to observe that under the Act it was not necessary for the maiming or wounding to be mortal, or for the wounding to cause a permanent injury.⁴⁰ Finally, though the killing or injuring of the animal must be from a malicious

be concluded to be either unsuitable or superfluous and ought therefore to be expunged from the statute book. *Ibid.*, p. 5. This was undoubtedly a very imaginative and arresting proposal. In England, however,—according to Dr. C. K. Allen—'Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted in our jurisprudence that a statute might become inoperative through obsolescence.' *Law in the Making* (1939), p. 393. Possibly the Committee's proposal was an offspring of the doctrine of desuetude which was accepted in some cases up to the end of the eighteenth century, and according to which 'if a statute had been in existence for any considerable period without ever having been put into operation, it might be treated as null.' See Allen, *ibid.* footnote 4, p. 394. Apparently in Scotland, Acts can go into disuse by a posterior contrary custom; Allen quotes in support of this statement the opinion of the great Scottish jurist and comparative lawyer, Stair, *Inst.*, 12; and that of Erskine, *Principles of the Law of Scotland*, 6.

³⁹ *R. v. John Paty* (1770) 1 Leach, 72. The sentence was later commuted to transportation and upon a strong application from the county, a free pardon was ultimately granted. The Courts, however, refused to put a restrictive construction upon this part of the clause; thus in the case of *Robert Mott*, tried at the Old Bailey September Session in 1783 and convicted of wounding a gelding, Hotham B., acting on the authority of the *John Paty Case*, overruled an objection in arrest of judgment; 1 Leach, 73, note (a). Similarly in the case of *R. v. James Whitney*, the Judges to whom the case was referred for consideration determined that asses were cattle within the meaning of the Act: 1 M. C. C. (1824) 3. In the case of *R. v. Sarah Chapple*, pigs were held to be cattle within the meaning of the Act; Russ. & R. (1804) 77.

⁴⁰ In the case of *John Haywood*, the horse was rendered useless to the owner, and continued so at the time of the trial, the offender having driven a nail into the frog of the horse's foot; it was stated, however, that it would be perfectly sound again in a short time. Judgment was respited after conviction, on the doubt whether,—as the horse was likely to recover and the wound was obviously not a permanent injury,—the offence was within the statute. The Judges held the conviction right and considered the word 'wound' to be used in contradistinction to a permanent injury, such as maiming; East, 2 P. C. 1076—77, § 20.

motive towards its *owner* and not towards the animal⁴¹ yet, in order to bring the case within the Black Act, no express evidence of *previously existing malice* against the owner was necessary. If the fact was proved to have been done wilfully, which, in its turn, indicated a brutal or malignant mind, it was left to the jury to ascertain the real motive of the offence.⁴²

CLASS G

THE OFFENCE OF SETTING FIRE TO CERTAIN THINGS

Setting fire by any person or persons to any (1) house, (2) barn, (3) out-house, (4) hovel, (5) cock, (6) mow, (7) stack of (a) corn, (b) straw, (c) hay, (d) wood.

As to this clause, the following observations may be made. First, as set out above, a delinquent might be convicted under this clause even though, when setting fire, he was neither armed nor disguised. Secondly, the time of the commission of any of these offences not being specified, they might take place in the day-time or during the night and yet be punished in the same way, though one would have expected a gradation of punishment according to the time when the offence was perpetrated. Thirdly, the detailed specification of the possible objects of the crime still further broadens the scope of this clause. It had been held on an older statute,⁴³ which made it a felony to burn any ricks or stacks of corn, etc., at night, that, though these objects were expressed in the plural, the burning of even *one* rick, etc., was within this law.⁴⁴ No such doubt could arise in the case of the Black Act, which clearly makes both the main perpetrator of the offence and any principal in the second degree liable to be punished by death without benefit of clergy for setting fire to one stack of corn during the day-time. Moreover, this clause makes it an equally serious offence to burn a heap of straw during the day-time, and to burn at night an entire row of houses in a town.⁴⁵

CLASS H

OFFENCES AGAINST THE PERSON

Wilfully and maliciously shooting at any person (1) in any dwelling-house, (2) in any other place.

⁴¹ See *R. v. Pearce* (1789) 1 Leach 527, and *R. v. Shepherd* (1790) 1 Leach, 539.

⁴² East, 2 P. C. 1074, § 16; and Russell, *On Crimes*, II, 1687—88.

⁴³ 22 & 23 Car. II, c. 7, s. 2.

⁴⁴ See above, footnote 35.

⁴⁵ It should be noted that as regards the essential part of the offence in question, i.e., the 'setting fire to,' the Black Act did not go beyond the rules laid down by the Common Law. This meant that there must be an actual burning, neither an intention, nor even an attempt to burn a house by setting it on fire being an offence within the Act, unless a part of it was burned; however, it was not necessary that any part of the house should be wholly consumed by fire, the offence being complete even if the fire was put out, or went out by itself. Also, the burning had to be malicious and wilful, failing which it was only a trespass. On the other hand, this malicious and wilful burning need not correspond exactly with what the party had intended and set out to accomplish. See Coke, 3 *Inst.* 66; Hale, 1 P. C. 566, 568, 569; Hawkins, 1 P. C. 298, ch. 39, sects. 16 and 17; East, 2 P. C. 1019, ch. 21, § 3, and 1020, ch. 21, § 4.

As to this provision, it should first be stated that for this offence to come within the statute it had to be proved that the shooting was malicious, and therefore such as would have amounted to the crime of murder, if death had ensued.⁴⁶ It was not necessary for any evil consequence to follow, but the shooting had to be with a gun or other instrument so loaded as to create danger to the party aimed at, the probable consequence of which would be to kill or maim; it had also to be levelled at him.⁴⁷ Eden, first Lord Auckland, referred to this offence as follows: 'The crime of wilfully and maliciously shooting at a person is also made capital, though neither death nor maim should ensue. It is of dangerous consequence to make the attempt to commit a crime, and the actual perpetration of it, equally penal. An assault in any other manner, with intent either to maim or murder, is considered only as a misdemeanor.'⁴⁸ But neither an accidental shooting, nor a shooting effected—to quote East's words—'in the intemperance of passion' upon such provocation as would in law reduce the homicide to manslaughter, came within this provision of the Black Act. The offence might be committed by any person or persons.

It has already been noticed⁴⁹ that this clause of the Black Act was held to apply to principals in the second degree who were liable to the same punishment as principals in the first degree, *i.e.*, capital punishment without benefit of clergy. This decision also had an important bearing upon certain rules of criminal procedure. In 1785, at the Surrey Lent Assizes for Kingston, Gibson, Mutton and Wiggs were tried before Perryn B.,⁵⁰ the case being afterwards referred to all the Judges for their consideration. An objection was put forward, among others, on behalf of one of the prisoners by W. Garrow, one of the most successful advocates of his days. He claimed that, as this indictment charged the three prisoners *jointly* with the same act of shooting the pistol, and two had been acquitted, *one* only could be convicted of the charge, if the indictment contained separate charges against each of the prisoners, in distinct counts. However, as the prisoner had been convicted of another capital offence at the same time, the Judges gave no explicit ruling on this objection, though it seems that they did not consider it well-founded.⁵¹

⁴⁶ See *R. v. Gastineaux* (1786) 1 Leach, 417.

⁴⁷ *R. v. Empson* (1781) 1 Leach, 224; see also *R. v. Weston* (1782) 1 Leach, 247.

⁴⁸ *Principles of Penal Law* (2nd ed. 1771), p. 255. Eden is remembered in history as a close friend of Pitt and a very able ambassador to France and the Netherlands, where he concluded important commercial treaties. He also played a conspicuous rôle in furthering the movement for the reform of criminal law and the penal system in the eighteenth century. In this field he was undoubtedly a pioneer. Together with Blackstone and Howard he was instrumental in procuring a leading statute concerning the prison system of the country, while his book *Principles of Penal Law* is the first modern English treatise on the subject of penal law and criminal policy. Eden was strongly impressed by Cesare Beccaria and was much more critical of the penal system then prevailing in England than his contemporary Blackstone. See *Dictionary of National Biography*, VI, 362, and Sir William Holdsworth, *History of English Law*, vol. XII, pp. 364—365.

⁴⁹ See above, *Coal-Heavers' Case*, p. 59.

⁵⁰ 1 Leach, 357.

⁵¹ At the conference Gould J. mentioned the *Coal-Heavers' Case*, and Eyre B. said that several might be guilty of the same act of shooting 'as if a string were tied to the trigger, and they all pulled it.' See 1 Leach, 359, note (a). When afterwards, in the

A year later this point came up again in the case of Wells, tried at the Kent Spring Assizes in 1786 before Ashhurst J.⁵² There the indictment stated that the prisoner, and other persons unknown, shot at the prosecutor and, in the second count, that a person unknown shot at the prosecutor and that the prisoner was present aiding, etc.; it appeared that the shot was probably *not fired by the prisoner*, but nevertheless Ashhurst J. told the jury that if they were of the opinion that the prisoner and the other unknown persons acted in confederacy in attacking the prosecutor's house, and that in furtherance of this design the prisoner or *any of his associates* shot at the prosecutor, they should find the prisoner guilty. The jury acted upon this recommendation; and when the case came up for the consideration of the Judges they were all of the opinion that the direction was right, and the conviction proper, because the *Coal-Heavers' Case* was good law. In this way the *Coal-Heavers' Case* greatly helped to put the Black Act fully into effect in the case of several offenders acting in association, some of whom remained unknown, while even those brought to trial could not be proved to have been the principal perpetrators. It must however be observed that this extensive construction put on the Black Act in respect to aiders and abettors was rather exceptional, for as a rule capital statutes were, on this point, interpreted in favour of the accused, even when such an interpretation was at variance with the principles of Common Law.⁵³

CLASS I

THE OFFENCE OF EXTORTION

Knowingly sending any letter demanding money, a remission, or any other valuable thing (1) without any name subscribed thereto, (2) signed with a fictitious name.

In applying this clause the Courts had to face many subtle questions. The essential part of the offence was the demand embodied in any such letter of extortion, on the construction of which the operation of the whole clause largely depended. However, in a leading case on the subject,⁵⁴ it was ruled that although a mere request, such as asking for

case of *R. v. Young and Others*, Buller J. said: 'Three persons were indicted on the Black Act, for shooting at the prosecutor: they were all charged with the single act; and the indictment was held by all the Judges of England to be sufficient,' he was most probably referring to the conference held on the case of *Gibson, Mutton and Wiggs*: (1789) 3 T. R. 105.

⁵² Related by East, 1 P. C. 414, ch. VIII, § 7.
⁵³ Thus in the case of *Page and Harwood* tried under 1 Jac. I, c. 8, which enacted that 'every person which shall stab or thrust,' etc., shall suffer death without benefit of clergy, two persons were present aiding and abetting a third person who made the thrust. These two persons 'though agreed to have been principals in manslaughter at common-law, were admitted to their clergy. For, . . . though in judgment of law every one present and aiding is a principal, yet in the construction of this statute which is so penal, it shall be extended only to such as *really and actually made the thrust*; not to those who in construction of law only may be said to make it.' Foster, *Crown Law*, pp. 355—356. See also the case of *Evans and Finch*, tried under 39 Eliz., c. 15, for robbery in a dwelling-house. *Ibid.*, pp. 356—357.

⁵⁴ *R. v. Robinson* (1796) 2 Leach, 749. The case was tried by Lawrence J. and was afterwards referred for consideration to all the Judges, their opinion upon it being delivered by Buller J. A very able and learned defence was put up for the prisoner by his counsel, Randall Jackson. *Ibid.* pp. 756—764.

charity, without imposing any conditions, was not within the meaning of the word 'demand,' yet the demand need not be made in a peremptory manner, or be accompanied with a threat of bodily harm; as the law did not stipulate the form in which such a demand had to be made in order to bring the case within the statute, it was decided that the Courts should determine the matter themselves on the facts of each case. The Judges also overruled the objection raised by counsel for the defence, who submitted that the case under trial was outside the scope of the law because the definition of the offence in the statute was at variance with that in the preamble prefixed to it.⁵⁵ The most striking passage concerning this point of Buller J.'s exposition of the opinion of the twelve Judges, which also bears upon a wider question of criminal jurisprudence, runs as follows: 'Where the enacting clause of a statute refers to such offences *only* (our italics) as are contained in the preamble, it may be restrained by the preamble, but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief as the cause of making it, *and yet for the enacting part to embrace more general objects* (our italics) and extend to other cases which the legislature thought within the mischief.'⁵⁶ There can be no doubt that by putting an elastic construction upon the meaning of the word 'demand' and by deciding that the definition of the offence given in the preamble was not relevant, the Judges had already substantially broadened the scope of this clause. But in the same case they went even further, first, by holding that to send a letter signed with *initials* only, constituted an offence of sending a letter *without a name*, within the meaning of the Black Act; secondly, it was questioned whether a *bank-note* asked for by the prisoner was a *valuable thing* within the meaning of the Black Act, on the grounds that when the Act was passed a bank-note might not have been considered a valuable thing as it was not then an object of larceny.⁵⁷ The Judges resolved, however, that it was sufficient if the thing demanded was valuable at the time when the demand was made, even if it had not existed, or the value of it had not been known,

⁵⁵ Whereas the clause described the offence 'that if any person or persons (whether armed or disguised or not), shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, ransom, or other valuable thing,' the preamble of the statute reads: 'several ill-designing and disorderly persons have of late associated themselves under the name of *Blacks*, . . . and have likewise solicited several of His Majesty's subjects, with promises of money, or other rewards, to join with them, and have sent letters in fictitious names, to several persons, demanding venison and money, and threatening some great violence (our italics), if such, their unlawful demands, should be refused, or if they should be interrupted in, or prosecuted for such, their wicked practices, and have actually done great damage to several persons, who have either refused to comply with such demands, or have endeavoured to bring them to justice, to the great terror of His Majesty's peaceable subjects.'

⁵⁶ 2 Leach, 765. On the rôle played by preambles in the interpretation of statutes during the period with which we are now concerned, see Sir Fortunatus Dwaris, *A General Treatise on Statutes*, etc. (2nd ed. 1848), pp. 503—508, 659—660 and 664. From some of the observations in this treatise it would appear that the counsel for the defence's objection in the case of *Robinson* was on the whole not so unjustified.

⁵⁷ This was subsequently altered by the enactment of 2 Geo. II, c. 25.

when the statute was passed. Finally, they also ruled that it was immaterial whether the letter was sent direct to the prosecutor or not, and that it was sufficient to state in the indictment that the prisoner had sent a letter directed to the prosecutor, without expressly alleging that he had sent it direct to the prosecutor.⁵⁸ Extorting money by sending threatening letters was a common offence in the eighteenth century, and it was probably partly for this reason that the Courts interpreted the relevant clause of the Black Act so widely.⁵⁹

CLASS J

THE OFFENCE OF RESCUING ANY PERSON BEING IN CUSTODY UNDER THIS ACT

(1) Forcibly rescuing any person being lawfully in the custody of any officer or other person for any such offence.

(2) Procuring by gift or promise of money or other reward any of His Majesty's subjects to join him or them in any such unlawful act.

These two provisions accompany all the clauses of the Waltham Black Act and the extreme penalty of capital punishment without benefit of clergy is invariably attached to them.

PROVISIONS CONCERNING THE CONDUCT OF PROSECUTIONS

It ought finally to be noted that the Black Act also contains two general clauses respecting the rules of criminal procedure and the conduct of prosecutions, which were incorporated in this statute with a view to making its administration more stringent. The first clause stipulates that all Black Act offences may be 'tried and determined in any county in England, in such manner and form as if the fact had been therein committed.' Moreover, it was ruled in connection with such trials that a private prosecutor might initiate his prosecution in whatever county of England appeared to him to be the most conducive to the ends of justice.⁶⁰

⁵⁸ See the cases of *Jepson and Springett*, of *Heming* and of *Lloyd*; East, 2 P. C. 1115 ch. 23, § 2; 1116; and 1122—23, ch. 23, § 5, respectively.

⁵⁹ However, it must be mentioned that concomitantly with this judicial tendency to prevent the suspension of this clause through a too rigid interpretation of it, great care was also taken not to extend its operation too far, particularly in view of the highly penal consequences of infringing the relevant law. The following are the salient points of this restraining trend: first, it was determined that the clause might only be put into effect if an *actual demand* were made, and not when letters had been sent *with a view or intent* to extort money but without directly demanding it. Secondly, a distinction was established between a letter and 'writing,' the latter being excluded from the clause of the Black Act. Thirdly, no case was to be considered to be within the statute if the writer made himself known in the letter, even though he did not append his name. Fourthly, it was also settled that the act of *delivering* a threatening letter was outside the scope of 9 Geo. I, c. 22, even were the letter delivered by the husband of the writer.

⁶⁰ Blackstone, 4 *Comm.* 304. But it was expressly laid down by the Judges that he could not exercise this right for the purposes of injustice and oppression, for the words of the statute are '... And for the *better and more impartial trial* of any indictment or information ...' See *R. v. Mortis* (1771) 1 Leach, 73.

The second general clause is contained in sect. 13 of the Act which states that the shortness of the time within which prosecutions for offences against the statute of 3 Will. & Mary, c. 10 (an Act for the more effectual Discovery and Punishment of Deer-stealers), has been a great encouragement to offenders; it accordingly enacted that any prosecution for any offence against the said statute, shall or may be commenced *within the three years from the time of the offence committed*. This was more severe than many other enactments of the period, which in similar cases specified much shorter time limits.

IV

The above analysis of this remarkable statute shows its provisions to have been so numerous and sweeping that an accurate estimate of the number of offences for which it provided capital punishment without benefit of clergy is impossible. Classes A to K above indicate that this number must have been more than fifty; since, however, any of these offences might be committed by one of the seven groups of offenders set out in the first table, the fifty or more capital offences must be multiplied by seven. This would bring the approximate number of cases in which the punishment of death could be ordered under the Waltham Black Act close to the fantastic number of over three hundred and fifty. But even if it were maintained that the statute was unlikely to be applied equally to all the seven groups of offenders and that, say, four or five ought therefore to be the figure adopted for multiplication—even then, the final figure would still be over two hundred. It is very doubtful whether any other country possessed a criminal code with anything like so many capital provisions, as there were in this single statute. That Blackstone estimated the number of capital offences in English criminal law at the end of the eighteenth century to have been a hundred and sixty,⁶¹ seems to prove that none of the best known and most authoritative assessments were based on the whole substance of the Black Act. These various estimates of a hundred and sixty to two hundred⁶² apparently took only a few of its main provisions into account. No doubt some of the offences embodied in the Black Act called for a severe penalty;⁶³ but the Act provided the same capital punishment for, say, setting fire to houses and for the more serious cases of bodily assault, as for minor types of larceny. Thus, the Act constituted in itself a complete and extremely severe criminal code which indiscriminately punished with death a vast and heterogeneous mass of offences, without taking into account either the personality of the offender or the particular circumstances of each offence.

⁶¹ 4 *Comm.* 18.

⁶² The difference in these estimates is to be explained by the fact that the legislature was continually adding to the number of capital offences throughout the whole of the eighteenth century. Thus in the reign of George II thirty-three Acts were passed creating capital offences,—roughly one for every year of the reign. In the first fifty years of the reign of George III, that is in the years 1760—1810, no less than sixty-three capital Acts were incorporated in the Statute Book; the number of capital offences which these statutes created was of course much greater.

⁶³ See for instance the trial of Richard Parvin and his six associates who were convicted under this Act of murder and deer-stealing and executed in 1723. *The Complete Newgate Calendar*, ed. by G. T. Crook (1926), vol. II, p. 306.

Fear, and particularly fear inflamed by an unexpected emergency, is the worst counsellor of the penal legislator. It tempts him to forget one of the most essential principles of criminal policy, that of penal economy,⁶⁴ and from an exaggerated view of the existing danger to frame numerous repressive laws to meet a purely conjectural and undefined contingency. The object of his penal measures is then no longer the repression of certain definite criminal acts, but the prevention on broad lines of almost all possible forms of criminality. The result is the emergence of a rigid system of widely framed and indiscriminately applied laws, the sole purpose of which is to inspire terror. Very instructive in this respect are Lord Holland's remarks made in 1800 in the House of Lords during the discussion on the prolongation for another seven years of 37 Geo. III, c. 70, known as the Army and Navy Seduction Act. Like the Black Act, this statute was brought into existence by a sudden emergency, which gave rise to intense feelings of fear.⁶⁵ Lord Holland, a staunch supporter of the cause of penal reform, said in a speech, which was as wise as it was well balanced:⁶⁶ 'My Lords, the original bill was passed in a moment of danger and of alarm, at a moment when the legislature thought it necessary to impress persons in an actual state of mutiny, and those who, by such proceedings, might be agitated with various and uncertain feelings and apprehensions, with a conviction of their firmness and determination . . . I do not censure them for want of accurate investigation of the true principles of penal laws at that moment, though I certainly cannot pay them the compliment of pretending to have found, in this offspring of momentary passions, those traces of deliberative wisdom which would alone justify its becoming a permanent law; for, in laws of this nature, an error of judgment is attended with more fatal consequences, perhaps, than in any other branch of legislation whatever, unless it be in those which regard the regulation of provisions. . . . These laws in good times are null, in bad times they are bloody; and these laws, made on the spur of the occasion, are generally to be attributed to the want of deliberation, to the want of a serious attention to the fundamental principles on which all punishments ought to be established. It

⁶⁴ See, for instance, the stimulating remarks of W. E. Wahlberg, a distinguished Austrian professor of criminal law and procedure, in his *Criminalistische und nationalökonomische Gesichtspunkte*, Wien (1872), pp. 96—101, concerning what he calls 'das ökonomische Prinzip im Strafrechte.'

⁶⁵ 37 Geo. III, c. 70, owed its origin to the mutiny at the Nore in 1797. It is interesting to note that when Pitt introduced this bill he did not intend to make the offence in question more than an aggravated misdemeanour, to be punished by fine, imprisonment or transportation. And when Serjeant Adair made his speech urging the capital penalty, Pitt expressed doubts 'whether an increase of punishment was likely to be attended with the success the learned gentleman seemed to expect,' and further declared 'that it would carry with it more terror, but whether the execution of it would be more effective he doubted.' When the bill came into committee, however, Sir John Mitford, afterwards Lord Redesdale, and at that time Solicitor-General, proposed the words 'guilty of felony . . . without benefit of clergy'; the Commons were on the whole against the more moderate punishment proposed by Pitt, and the government did not oppose Mitford's suggestion. See *Parl. Hist.* (1797—1798), vol. XXXIII, cols. 810 and 815 resp. 37 Geo. III, c. 70, was continually prolonged and was finally made permanent by 57 Geo. III, c. 7.

⁶⁶ *Parl. Hist.* (1800—1801), vol. XXXV, cols. 770, 771 and 773.

is said, good laws have been made on the spur of the occasion. I believe there may have been some, perhaps many; but of penal laws, I believe, very few. I felt almost disposed to say none. But this I know, that almost all bad, wicked, and cruel penal laws have been made on that pretence, and hurried on with a precipitation utterly incompatible with prudence, moderation, or justice. Of all laws, they are those which should be most scrupulously cut down and squared to the rule of uniform and invariable principle. They are those where a deviation from principle leads to the most pernicious consequences, and tends to the defeat of their own object with the most certainty. It is not proper, it is not dignified, it is not wise, it is not just, to pass such laws, without deliberation and inquiry.'

It would hardly have been possible to describe in more concise and forcible language the political and legal structure of emergency penal laws. The impact of factual and psychological circumstances which brings them into being, also imbues them with a dynamic elasticity which causes them to be exceptionally comprehensive, both qualitatively and quantitatively. Thus, acts remote from and preparatory to an offence often become punishable in the same way as the offence itself, and delinquents are penalised not because they have committed an offence, but because of the social danger they present. That the scope of such enactments is extremely wide is best shown by our synoptical tables. There is hardly a criminal act which did not come within the provisions of the Black Act: offences against public order, against the administration of criminal justice, against property, against the person, malicious injuries to property of varying degree—all came under this statute and all were punishable by death.

Although statutes of this type are regarded as purely temporary and provisional measures when they are enacted, they soon come to be looked upon as essential bulwarks of public order and social safety, the very fact that it was thought necessary to make them capital, helping to consolidate the belief in their indispensability for the maintenance of order.⁶⁷ In later times, it has been argued by some and agreed by many, that if their predecessors made the law so severe they must have had their reasons, and that it would therefore be dangerous to neglect or reverse their opinions. If the offences dealt with under such an Act are on the decrease, there is an almost natural inclination to attribute this beneficial result to the death penalty having been appointed in time; while if they happen to increase, it is most vigorously asserted that to relax the law at such a moment would inevitably be interpreted as weakness and would operate as a new incentive to crime. Hardly a single provisional capital statute was repealed at the end of its test period, almost all

⁶⁷ 'Among the several cloudy appellatives,'—wrote Bentham, that somewhat impatient and radical, but very great, legal reformer,—'which have been commonly employed as cloaks for misgovernment, there is none more conspicuous in this atmosphere of illusion than the word *Order*.' *Works*, Bowring's edition, vol. II, p. 441.

being made permanent measures after one or more extensions. The history of the Black Act fully confirms this tendency. Enacted in 1723 for three years only, it was prolonged several times,⁶⁸ and was ultimately made permanent in 1758,⁶⁹ thirty-five years after its original enactment. This course could only mean that the legislature held experience to have proved that the Black Act ought to become an integral part of the criminal laws of the land. It is significant that some of the leading judicial authorities reached the same conclusion much earlier. Lord Hardwicke, for instance, after enumerating *circa* 1735 such new Acts passed for the suppression of outrage and lawlessness as the Black Act, the Acts against forgery, assault and robbery, smuggling and the destruction of turnpikes, not only declared that the laws 'however good and wisely enacted, could avail nothing, unless properly and rigorously executed,' but also expressed the opinion that 'the degeneracy of the present times, fruitful in the inventions of wickedness hath produced many new laws necessary for the present state and condition of things.'⁷⁰ The Black Act, passed as an exceptional and temporary measure in order to cope with a sudden local emergency, was regarded only about thirteen years later by the then Lord Chief Justice as an essential and indispensable instrument for preserving peace and preventing criminality.

Any capital statute, and particularly one so comprehensive as the Black Act, almost inevitably leads to the enactment of other similar measures.⁷¹ Such a statute sets up a standard of punishment which exercises a decisive influence on the subsequent criminal policy of the legislature. When penalties have to be appointed for other offences, Parliament naturally looks upon leading current statutes as valid precedents for determining with what degree of severity to punish these new offences. In this way the enhanced punishments of existing statutes inflate those appointed under later ones. As a result of this tendency the Black Act, itself a voluminous capital code, became a point of departure, or rather a breeding-ground for new capital laws. Thus, sect. 6 of 6 Geo. II, c. 37, stipulated that as long as the Black Act continued in force any one guilty of maliciously cutting any hop-binds growing on

⁶⁸ First in 1726 by 12 Geo. I, c. 20.

⁶⁹ 31 Geo. II, c. 42.

⁷⁰ P. C. Yorke, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain* (1913), vol. I, p. 135.

⁷¹ In his classical exposition of the relation between *Law and Public Opinion in England*, A. V. Dicey makes the following observation on the subject of emergency laws: 'It is far, indeed, from being true that laws passed to meet a particular emergency, or to satisfy a particular demand, do not affect public opinion; the assertion is at least plausible, and possibly well founded, that such laws of emergency produce, in the long run, more effect on legislative opinion than a law which openly embodies a wide principle. Laws of emergency often surreptitiously introduce or reintroduce into legislation, ideas which would not be accepted if brought before the attention of Parliament or of the nation. . . . Laws, indeed, passed for a limited or practical purpose—described as they are by the far too complimentary term of tentative legislation—exert the greater moral influence because they fall in with our English preference for dealing only with the special matter actually in hand, and with our profound reverence for precedent. Yet this apparent prudence is, in reality, often no better than the height of rashness. A principle carelessly introduced into an Act of Parliament intended to have a limited effect may gradually so affect legislative opinion that it comes to pervade a whole field of law.' (1930), pp. 45—46.

poles in any plantation of hops should suffer death as a felon, without benefit of clergy. But this was only one of many new, capital, non-clergyable offences which this Act created; among these, the laws connected with the clause of the Black Act concerned with the offence of setting on fire,⁷² and those following up and broadening the provisions dealing with the sending of threatening letters,⁷³ ought in particular to be mentioned.

In common with the Black Act itself, these subsequent capital statutes were adopted without opposition. Their smooth and uneventful passage through both Houses is particularly significant in view of the fact that in the 'unreformed' Parliament of the eighteenth century a very elaborate and firmly established procedure existed for enabling each proposed bill to be submitted to a most searching and detailed investigation.⁷⁴ The extreme readiness with which the Black Act and other similar statutes were continually being adopted by the legislature of the eighteenth century⁷⁵ would seem therefore to imply the existence of certain underlying causative forces of deep import and significance. Difficult as it is to estimate the extent to which certain laws passed in a remote historical period faithfully reflect the dominant trend of public opinion, it is nevertheless submitted that in the sixty years immediately

⁷² See above, p. 67.

⁷³ Above, p. 69. See, for instance, the following statutes: 27 Geo. II, c. 15; 10 Geo. II, c. 32 (s. 6); 9 Geo. III, c. 29 (s. 2); 12 Geo. III, c. 24 (s. 1); 33 Geo. III, c. 67 (s. 5); while the first relates to the offence of sending threatening letters, the remainder introduced the absolute capital sentence for new types of the offence of wilfully setting on fire.

⁷⁴ In his treatise on *The Procedure of the House of Commons* (1908), 2 vols., Professor J. Redlich repeatedly emphasizes that 'the procedure of the House of Commons, its order of business, was worked out, so to speak, as the *procedure of an opposition*, and acquired once for all its fundamental character' (vol. I, p. 57). In this connection he also quotes the information given by a Parliamentary committee that no less than eighteen different questions, each with its corresponding division, were required for the passage of a bill through the House, without reckoning those of the committee stage; Redlich adds that this was the normal framework of the discussion on a bill, irrespective of all the conceivable variations of subsidiary motions, instructions, and motions for adjournment. *Ibid.* pp. 64—65.

⁷⁵ This remarkable tendency of the eighteenth century Parliaments to pass capital statutes is vividly reflected in the following two stories. In his great speech of 1819, Sir James Mackintosh mentioned the following fact which was imparted to him by Burke: once when the latter was about to leave the House, one of the messengers called him back, on which Burke replied that he was going on urgent business. 'Oh,' replied the messenger, 'it will not keep you a single moment: it is only a felony without benefit of clergy!' Burke also assured Mackintosh, that 'although, as may be imagined, from his political career, he was not often entitled to ask favour from the ministry of the day, he was persuaded his interest was at any time good enough to obtain their assent to the creation of a felony without benefit of clergy.' *Parl. Deb.* (1819), vol. XXXIX, col. 787. The other story we owe to Sir Thomas Fowell-Buxton, who heard it from Wilberforce, and related it to the House in the following terms: 'Sir William Meredith happened one day to go into a committee-room, for the purpose of writing a letter; at one corner of which he observed a gentleman seated at a table, and seemingly asleep, to whom a clerk was reading a piece of parchment, which looked like an Act of Parliament. Sir William was continually interrupted by a kind of chorus, with which every paragraph concluded: "Shall suffer death without benefit of clergy." At length Sir William said, "What may this heinous offence be which you are visiting with so terrible a penalty?"—"Why, Sir," replied the legislator, "we country gentlemen have suffered much by depredations on our turnips—we have at length determined to put a period to the practice; and my good friend the minister has been so obliging as to allow me to make it death without benefit of clergy." ' *Parl. Deb.* (N.S.) (1821), vol. V, col. 928.

following the enactment of the Black Act a considerable section of the community supported this type of legislation, and considered it both justified and effective.⁷⁶ The Black Act and other similar capital statutes were framed in accordance with the then predominant penal doctrine which, in its turn, had not only been approved by an overwhelming majority of the legislature, but also enjoyed the strong and widespread support of public opinion. How well that penal doctrine, most lucidly expounded by Dr. W. Paley in his '*Principles of Moral and Political Philosophy*,'⁷⁷ expressed current views on the purpose of punishment and the system of criminal justice best suited to achieve it, is shown by the great debate in both Houses of Parliament following Sir Samuel Romilly's speech on the reform of criminal law.⁷⁸ On this occasion—neither for the first, nor for the last time—the wisdom and the effectiveness of Paley's penal doctrine was contrasted with 'the visionary and subversive scheme' of Romilly, and was acknowledged as the fundamental and unalterable principle to be followed in criminal legislation.⁷⁹ The Black Act was in perfect harmony with this doctrine.⁸⁰

⁷⁶ In this connection it should be noted that according to Dicey the very reactionary Combination Act of 1800 'precisely corresponded with the predominant beliefs of the time.' According to the same author, the repressive legislation of 1819, embodied in the six well-known Acts 'may have been unwise, but it was an attempt to meet a serious crisis and was the natural outcome of the public opinion which in 1819 and 1820 determined the action of Parliament.' Dicey, *Law and Public Opinion in England* (1930), pp. 99 and 103 resp. On the influence exercised by public opinion on the unreformed House of Commons, see also E. Porritt, *The Unreformed House of Commons* (1909), vol. I, pp. 267—282.

⁷⁷ (1817), Chap. IX 'Of Crimes and Punishments,' pp. 406—428; this book was first published in 1785 and went through a considerable number of editions, fifteen of which appeared during the author's lifetime. According to the D. N. B., XV, 103, Paley got £1,000 for his MS. from Faulder, who still made a good bargain. Paley's work was adopted as a Cambridge text-book.

⁷⁸ *Parl. Deb.* (1810), vol. XV, cols. 366—371.

⁷⁹ Paley's great influence may be judged from the fact that Romilly devoted a great part of his speech to refuting the latter's doctrine, though this very refutation had the effect of further strengthening the opposition to his scheme. For an illustration of this point it is instructive to read the following passage from the speech made by Windham, in reply to Romilly's exposition: 'The system of morality contained in Dr. Paley's works was founded on the nature and moral fitness of mankind, and until man should become a different being from what he is at present, that system would continue to be the wisest and the justest for the guidance and government of mankind.' *Ibid.* col. 371.

At the same time, Romilly received a letter of congratulation from Dugald Stewart, who wrote as follows: 'Indeed, I have more than once lost my temper in discussing the merits of that part of his (Paley's) book, with some of your countrymen, who were disposed to look up to him as an oracle both in politics and in morals. Your reply to him is, in my opinion, quite unanswerable.' Quoted by Romilly in his *Memoirs* (1840), vol. II, p. 305.

The influence of Paley's doctrine was so weighty, however, that as late as 1836 the Commissioners who drafted the Second Report on Criminal Law found it necessary to precede their recommendations on the reform of criminal law by a lengthy critical examination of Paley's opinions. For, as they put it, 'they are all that could be said for the practice by an eminently acute and skilful reasoner; and because they are the arguments chiefly relied upon by those who have defended it when subjected to Parliamentary discussion.' See 'Second Report from His Majesty's Commissioners on Criminal Law' (1836), 343, in *Parliamentary Papers* (1836), vol. XXXVI, p. 183.

⁸⁰ The two leading principles of Paley's penal doctrine are as follows: 'The crime must be prevented by some means or other; and consequently, whatever means appear necessary to this end, whether they be proportionable to the guilt of the criminal or not, are adopted rightly, because they are adopted upon the principle which alone justified the infliction of punishment at all.' According to Paley there are two methods of administering penal justice; the first 'assigns capital punishment to a few offences, and inflicts it invariably';

The long struggle for the abrogation of the Black Act constitutes an important chapter in the history of the movement for the reform of criminal law and its ultimate repeal was a significant symptom of the oncoming of the new era. Actually, this Act had never fully been put into effect. The well-founded and eloquent remarks on the administration of capital statutes made by Sir William Grant M.R., in the course of a debate in the House of Commons in 1810 were largely applicable to the Black Act.⁸¹ Due account must also be taken of the mitigating effect of 8 Geo. III, c. 15, which gave new facilities to Assize Judges to commute sentences of death without benefit of clergy to transportation for any term they thought proper; in addition to this considerable statutory relaxation of the law, the royal privilege of pardon was very frequently exercised. This disparity between the letter of criminal laws and the way in which they were administered soon began to be regarded as a symptom and a proof of their anomalous structure, and led to the steadily growing conviction that they were incapable of effectively preventing delinquency. But although it had become clear to many that as long as Acts like the Black Act remained on the Statute Book the system of criminal justice could not be adequately reformed, the efforts which penal reformers had to employ to obtain its repeal strikingly testified to the greatness of the difficulties they had to overcome before achieving their broader aims. In spite of their efforts, the Black Act remained in force for a whole century: from 1723 to 1823. Though some proposals to lessen the severity of the criminal code were formulated as early as 1772,⁸² specific recommendations for the abrogation of the leading provisions of the Black Act were only brought forward for the first time in the *Report on Criminal Laws*, 1819.⁸³ But they,

the second 'assigns capital punishments to many kinds of offences, but inflicts it only upon a few examples of each kind.' Secondly,—'By the number of statutes creating capital offences, it (the law) sweeps into the net every crime which, under any possible circumstances, may merit the punishment of death; but, when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations of whose crimes render them fit example of public justice. By this expedient, few actually suffer death, whilst the dread and danger of it hangs over the crimes of many.' *Principles of Moral and Political Philosophy* (1817), pp. 407, 410, and 411—412 resp.

⁸¹ *Parl. Deb.* (1811), vol. XIX, Appendix, cols. LXV—LXIX. Referring to the administration of capital statutes concerning larceny, Sir William Grant said: 'This universal confederacy amongst the middling classes of society not to punish these offences by death: this conduct of the higher orders in dispensing with the law, is to me conclusive evidence that in the advanced state of civilization in this country, the punishment of death is too severe for this crime.' *Ibid.* col. LXVII.

⁸² See *Journals of the House of Commons* (1770—1772), vol. XXXIII, pp. 442a and 612a. See also the debates in the Commons (1772) recorded in the *Parl. Hist.* (1771—1774), vol. XVII, cols. 448—453. This move was initiated by Sir William Meredith and was supported among others by Charles James Fox. Burke also took an active part in it.

⁸³ *Parliamentary Papers* (1819), vol. VIII, p. 1. The chairman of the Committee was Sir James Mackintosh; Wilberforce, Scarlett, Fowell-Buxton, Brougham and Lord John Russell were among the members. The scientific and practical value of the Committee's Report is altogether exceptional, and it constitutes a permanent contribution to modern criminal science and penal policy. Professor Jerome Hall praises its 'thoroughness . . . and the modernity of its approach,' and justly says that 'It is a document of rare importance for anyone interested in the effect of public opinion upon the actual operation of legal rules.' *Theft, Law and Society*, Boston (1935), p. 102.

as well as other moderate proposals embodied in this Blue-Book met with formidable opposition. In 1821, the *Quarterly Review*,⁸⁴ a highly influential current periodical, published a weighty article⁸⁵—amounting in fact to a veritable counter-report—which critically examined the evidence collected by Sir James Mackintosh's Committee, and also rejected all its recommendations. As regards the Black Act, the *Quarterly Review* strongly urged its retention on the grounds that the crimes to which it related were very serious, and that, by prolonging its validity and making it permanent, the legislature had pronounced that in their opinion it was an indispensable law. The only concession made by the *Review* was the admission that the redrafting of the Act so as to improve its wording and readjust some of its provisions might, perhaps, deserve more careful consideration.⁸⁶

A few months after the publication of the 1819 Report, Mackintosh brought in a series of Bills based on its recommendations, of which one aimed at repealing some of the leading provisions of the Black Act.⁸⁷ This Bill was passed by the Commons, but was opposed with determination in the House of Lords by Lord Eldon, Lord Liverpool, Lord Bathurst and by Lord Redesdale, who held that capital punishment should be retained for stealing deer. It was mainly owing to the opposition of Lord Eldon and Lord Liverpool that all the provisions relating to the Black Act were removed from Mackintosh's Bill which, thus curtailed, became law on July 25, 1820.⁸⁸ Referring to this debate the *Quarterly Review*

⁸⁴ The *Quarterly Review* was founded to counteract the intellectual influence of the famous organ of the Whigs, the *Edinburgh Review*. Though on certain contemporary questions its outlook was more liberal than that of the ultra-Tories, its views on penal problems did not differ substantially from those of Lord Ellenborough and Lord Eldon; the *Edinburgh Review* on the other hand strongly supported the efforts at reform of Romilly and his successors. The influence of these two periodicals on the shaping of public opinion was considerable. According to Halévy, their combined circulation in 1814 was 20,000 copies. *History of the English People* (1924), vol. I, p. 443.

⁸⁵ See 'Report from the Select Committee on Criminal Laws, etc.' *Quarterly Review* (1821), vol. XXIV, No. XLVII, pp. 195—270. This article appeared unsigned, but we have been able to ascertain that it came from the pen of John Miller, of Lincoln's Inn, the learned and able author of a series of highly interesting articles both on penal matters and on the subject of Law Reports and the codification of the law. Miller later included the paper quoted above in a slightly modified form in his book *An Inquiry into the present State of the Statute and Common Law of England* (1822), pp. 87—332.

⁸⁶ Miller also refutes the argument invoked by the 1819 Committee that as the Black Act was hardly ever used, it had thus become obsolete and ought to be repealed: 'When those to whom the task of legislation is committed have once determined an act to be a crime, and fixed the penalty which the circumstances of the country where it is to be enforced, in their judgment require to be set against it, there is no reason why it should not be inflicted though it occurs only once in a century. . . . It surely accords better with the character, dignity and interest of an enlightened people, to provide with as much deliberation as human foresight will permit, for all the accidents or diseases to which the body politic is accessible, than to indulge the illusion that health and quietness will always last, and have the remedy to seek as well as administer when the disorder has actually overtaken it.' *Ibid.* pp. 115 and 116—117.

⁸⁷ *Parl. Deb* (1819), vol. XL, cols. 1525 and 1533; *Parl. Deb.* (N.S.) (1820), vol. I, cols. 227—237.

⁸⁸ 1 Geo. IV, c. 116. Of Lord Eldon, Walter Bagehot wrote in one of his brilliant essays: 'As for Lord Eldon, it is the most difficult thing in the world to believe that there ever was such a man. It only shows how intense historical evidence is, that no one really doubts it. He believed in everything which it is impossible to believe in—in the danger of Parliamentary Reform, the danger of Catholic Emancipation, the danger of altering

paid a compliment to the House of Lords, 'which on this occasion again acted as a floodgate against the tide of legislation which is now rolling so impetuously through the House of Commons.'⁸⁹ In 1823 Mackintosh submitted to the House of Commons a series of resolutions for the reform of criminal law; one of these resolutions proposed to repeal the Black Act, with the exception of the clauses relating to wilfully setting fire to property and to maliciously shooting at a person.⁹⁰ Although at this stage 'the age of reform'⁹¹—to use the expression of a distinguished contemporary historian—was only just beginning, the balance of political forces in the country had already undergone a notable change. While the Whigs—from the beginning the determined and enthusiastic supporters of the reform movement⁹²—still formed a powerless opposition, the government of the country was under the influence of political forces known as 'liberal toryism.'⁹³ On March 23, 1820, Peel wrote in a letter to Croker: 'Do you not think that the tone of England . . . is more liberal, . . . than the policy of the government? . . . Public opinion . . . is growing too large for the channels that it has been accustomed to run through.'⁹⁴ That was certainly true of the question of the reform of criminal law, on which the government had already been defeated

the Court of Chancery, the danger of altering the Courts of Law, the danger of abolishing capital punishment for trivial thefts, the danger of making landowners pay their debts, the danger of making anything more, the danger of making anything less.' *Literary Studies* (1910), vol. I, p. 150.

Conservatism in legal matters, however, particularly in England, is most definitely a much more complicated phenomenon than it might appear from the above quoted passage. If an attempt is made to follow the whole of the history of legal progress, instead of concentrating only on certain striking episodes, it soon becomes apparent that conservatism played an indispensable rôle in these legal developments. See, on this subject, the wise and well-balanced remarks of the late Professor John F. Dillon, of Yale University, in his book *The Laws and Jurisprudence of England and America*, London (1894), pp. 292—307, where he discusses this intricate but highly important subject under the arresting title of 'The compensations of conservatism.' Furthermore, it would be wrong to consider the Eldonian approach to legal reform as typical of the conservatives' attitude to these questions. His notorious hostility to any changes was not only the product of his personal, altogether exceptional, obstinacy, but it was also largely determined by certain political and social events of his time. These powerful and threatening events shaped the outlook of many other distinguished men besides Lord Eldon and it is therefore not fair to consider their opinions as being synonymous with the political philosophy and the general outlook peculiar to conservatism.

⁸⁹ *Quarterly Review* (1821), vol. XXIV, No. XLVII, p. 232.

⁹⁰ *Parl. Deb.* (N.S.) (1823), vol. IX, cols. 409—410. 'Were there any persons,' asked Mackintosh, 'called Blacks from whom any danger was to be apprehended at the present time? And if not, what did the existence of such a statute prove, but the unfortunate pertinacity with which bad laws when once adopted were adhered to?' He also denied that the making of the Black Act perpetual in any way proved its indispensability. First, because Bills were less thoroughly discussed at that time, and secondly, because the legislature was most probably influenced in its decision to make the Black Act permanent by the remarkable case of a man named Baurard, who sent a threatening letter to the Duke of Marlborough only a few months before.

⁹¹ See Professor E. L. Woodward, *The Age of Reform, 1815—1870*; Vol. XIII of the 'Oxford History of England,' ed. by Professor G. N. Clark.

⁹² Macaulay was undoubtedly right in associating the Whig party with the initiation and the furtherance of this cause. See his flamboyant speech to the electors of the city of Edinburgh, in 1839, in Lord Macaulay's *Complete Works*, ed. by Lady Trevelyan (1866), vol. VIII, p. 159.

⁹³ G. M. Trevelyan, *British History in the Nineteenth Century and After* (1943), p. 195.

⁹⁴ J. R. Thursfield, *Peel* (1928), pp. 19—20.

three times in the House of Commons.⁹⁵ In addition, an impressive number of petitions from most respectable sections of the community in all parts of the country urging penal relaxation were mounting up in both Houses of Parliament; similar opinions were voiced by many leading periodicals and newspapers, while the famous 'confederacy' of would-be prosecutors, of jurors and even of Judges intensified their efforts to paralyse the operation of sanguinary laws, thus threatening to undermine the very foundations of the system of criminal justice. This system was undoubtedly passing through a grave crisis, for it was becoming more and more at variance with the humanitarian feelings and the ethical standards of the community. The time was not yet ripe for the solution of the momentous questions of parliamentary reform and religious emancipation: but penal reform could no longer be delayed. In 1823, in reply to Mackintosh's speech and the series of resolutions which he laid before the Commons, Peel, who was then the Home Secretary, admitted the urgency of the task and promised that some amendments in the system of criminal justice would be carried in the immediate future.⁹⁶ Thus the need for penal reform was officially recognized for the first time. A few months later, the Home Secretary brought in a number of Bills abolishing capital punishment, all of which were passed by Parliament. One of these Bills, which became law on July 8, 1823,⁹⁷ virtually abrogated the Black Act by repealing all its clauses except those relating to setting fire to property and to maliciously shooting at a person, which remained capital offences.

The passing of the Black Act coincided with the ascendancy of the doctrine of undifferentiated terror and crude retribution in the field of criminal legislation; the parliamentary struggle for its repeal was the first serious indication of a new approach to the problems of the punishment and treatment of offenders. Its elimination from the Statute Book heralded the advent of the great reform movement, which was destined to transform the whole body of criminal laws. Like so many other visionary schemes, the penal utopia of Sir Samuel Romilly was about to become a reality.

⁹⁵ In 1819, 1821 and 1823.

⁹⁶ *Parl. Deb.* (N. S.) (1823), vol. IX, cols. 420—429.

⁹⁷ 4 Geo. IV, c. 54.

WARRANTIES OF LAND IN THE THIRTEENTH CENTURY

(continued)

S. J. BAILEY

§ 8.—VOUCHER AND ITS ASSOCIATES

WE have seen¹ that a tenant of land, who had a warrantor, had the right to 'vouch' that warrantor if some adverse claimant sued him for the land. Thereupon the warrantor was obliged to defend the action for him and, should the adverse claimant prevail, to compensate him with other land (*escambium*). Vouching to warranty, however, was not the only procedural device that enabled a third party to intervene and defend an action for land in the thirteenth century. Not infrequently, for example, a defendant would say in Court that, for some reason or another, he 'cannot answer without A,' and that he accordingly 'prays aid' of A in the action.²

1. *Aid-prayer* was evidently regarded by contemporary writers as vastly less important than voucher to warranty: their references to it are comparatively rare and uninformative.³ It existed because all the ordinary actions for land were, both in form and in substance, actions for obtaining possession or *seisin* of the land. From this it followed that the action was invariably against the person now actually in possession or *seisin*, even though his interest in the land was but temporary—*e.g.*, for his life only. The writs which instituted an action and summoned the defendant made no mention of and were not served upon anyone who had a mere reversionary or future interest in the land. Accordingly, he had no right whatever to intervene and contest the plaintiff's claim, except with the court's consent; and this although the result of the action might utterly destroy his interest or, at best, put him to the delays and uncertainties of the cumbrous writ of right.⁴ *Aid-prayer* differed from voucher to warranty in two important respects: (i) if the person prayed in aid defaulted, the defendant was allowed himself to resume the defence of the action; (ii) a person prayed in aid had ordinarily no liability to

¹ *Ante*, vol. 8, 274—299.

² To say that one 'cannot answer without' X may equally be a prelude to vouching him to warranty: *e.g.*, *Exceptiones ad cassandum Brevia*, Law Tracts, p. 174 (doweress vouches heir); Fitzherbert, *Voucher*, 273 (1222: tenant vouches lord because another lord tries to exact suit of court from him). This form of words was the customary polite formula for vouching the King to warranty: see Bract. f. 382b; also *ante*, vol. 8, pp. 288, 292; and contrast Holdsworth, 9 H. E. L. 10 (that one cannot vouch the King but can only pray aid of him).

³ The later Abridgments, however, are well stocked with cases on the subject. Modern text-books on Legal History say little of it; but there are helpful passages in Plucknett, *Concise History of the Common Law*, 3rd ed., pp. 364, 496—497. See also 2 P. & M. 9—10.

⁴ Some slight improvement of his position was wrought by statute in 1285; see note 21 *post*, p. 85.

provide *escambium* for the defendant if the plaintiff won.⁵ Accordingly, although to pray aid was thus less hazardous than to vouch, it lacked the desirable prospect of compensation should the defendant's lands be lost by an adverse judgment. A third peculiarity of aid-prayer was that, unlike warranty, it did not rest upon any kind of promise or contract. A person prayed in aid came to court for the very good reason that he had himself a prospective interest in the land which he wished to protect. It seems, indeed, that the law did not permit him to be prayed in aid unless it appeared that he claimed to have some interest in the land, of a reversionary character, which would be prejudiced or lost if the defence failed.⁶

This being the rule, one would naturally expect to find many instances of tenants for life praying aid of their reversioners. In fact, however, this seems to have been rare. That most litigious of life-tenants, the *doweress*, had a far better remedy than aid-prayer: she could vouch her husband's heir to warrant her,⁷ and this carried a possibility of *escambium* whereas aid-prayer did not. The ordinary *lessee for life* had similarly an implied warranty from his lessor or reversioner.⁸ It therefore follows that the only life-tenant who had need to pray aid in the thirteenth century was the *tenant by the curtesy*; and he, we are told, can pray aid of his late wife's heir whom he begat.⁹ As regards the *lessee for years*, although Maitland has said that a real action against him would be dismissed,¹⁰ it is not altogether clear that in Glanvill's day the lessee

⁵ Y. B. 22 Ed. I (1295), R. S., pp. 468—476, *per* Metingham and Hertford JJ.; Hengham, *Parva*, p. 69.

⁶ Contemporary writers merely give instances where aid-prayer is admissible, without a general rule. In Fitz. *Ayde*, 175 (1263), however, a tenant by the curtesy conveyed his deceased wife's inheritance with warranty to X; subsequently X vouched him to warranty in an action in which a third party claimed the land; the vouchee duly warranted and thereupon prayed aid of the wife's infant heir; the Court refused, on the ground that to defend X in his seisin could not advantage the heir (for X's seisin operates to his disherison). There was also a rule that, to pray aid of a person, one must 'make oneself privy' to that person: Fitzherbert, *Ayde*, 184 (1306). This seems to imply that one must in some sense 'hold of' that person.

⁷ *Ante*, vol. 8, p. 283; also Hengham, *Parva*, pp. 68—69 (who adds that if the adverse claim is merely for something appurtenant to her tenement she ought merely to plead that she cannot answer without the heir; and that although this is technically aid-prayer she will get *escambium*); Fitz. *Voucher*, 276 (1231). In Y. B. 22 Ed. I (1295), R. S. pp. 468—476, a doweress perturbed the court by praying aid of the heir instead of vouching him: Hertford J. said that she ought not to pray aid; and Metingham J. said she was foolish in doing so, thereby losing her chance of *escambium*.

⁸ Bract. f. 381, § 5; Fitz. *Ayde*, 178 (1304); Fitz. *Voucher*, 289 (1303: here the lessor had given an express warranty and had then assigned the reversion to R: *held*: the life tenant can elect whether to vouch lessor's heir or R).

⁹ Hengham, *Parva*, 69 (one advantage is that the plea will usually be stayed until that heir comes of age); Fitz. *Ayde*, 175 (1263); Y. B. 22 Ed. I (1295), R. S., *per* Hertford J., at p. 468. Fitz. *Voucher*, 275 (1230) gives a case where tenant by the curtesy vouched the heir, and the reporter adds (evidently surprised) 'and this voucher was received by the Court.' Bract. f. 383b, gives a curious case where the mother's heir is vouched on her warranty, but, having no assets by descent, may say that he cannot answer without the tenant by the curtesy: this appears to be a reversal of the normal aid-prayer.

¹⁰ 2 P. & M. 109 (as regards writ of right or writ of entry); cf. 2 P. & M. 106 (if evicted by a third person he 'frequently if not always' enjoys the benefit of a warranty and can claim an equivalent from his lessor). Cf. Holdsworth, 3 H. E. L. 248, 249, that the warranty

for years did not in fact pray aid of his lessor;¹¹ and there is no doubt that in pleas of dower he could vouch his lessor's heir.¹² At the close of the century, the true nature of an *estate tail* was still open to question: there was still a tendency to regard the original donee in tail as a mere life-tenant, the fee being in his issue when born. Nevertheless, it was ultimately decided that, although he may pray aid of his reversioner, he cannot pray aid of his own issue.¹³

Perhaps the most frequent example of aid-prayer in the thirteenth century occurred when, after an inheritance had been partitioned among *co-parceners*, one of them was sued by a stranger for land comprised in her allotted share.¹⁴ This is one of the three cases of aid-prayer which Hengham gives; and he emphasises that the *co-parcener* (unlike others) has a form of *escambium* if, having prayed aid of her parceners, judgment goes against her.¹⁵ There was no difference, for this purpose, between male co-heirs of partible socage and co-heiresses; but, naturally enough, aid-prayer was never allowed between parceners unless the plaintiff was suing one of them in pursuance of a claim that had arisen before the partition.¹⁶ Two problems remain. First, how comes it that aid-prayer was appropriate between parceners after partition? Second what was the nature of the *quasi-escambium* that it brought? That aid-prayer was allowed implies that, despite the partition, each parcener retained some sort of reversionary interest in the land that had been allotted in fee to his *co-parceners*. This was indeed the case, for, on the death of a *co-parcener* without issue, there was a *jus accrescendi* whereby his share accrued to the other parceners or their heirs.¹⁷ As for the

clause in a lease for years was similar to that in other demises, and developed similarly from the pledge of faith.

¹¹ Glanv. Bk. 3, c. 1, says that if the defendant lessee discloses that X is his lessor, X must be summoned by another writ and the plea begin afresh against X. This would not be an unfair description, I think, of what happens when a defendant prays aid of X or vouches him to warranty.

¹² *E.g.*, B. N. B. 106 (1222), 1576 (1223). See also *ante*, vol. 8, p. 288.

¹³ Y. B. 22 Ed. I (1295), R. S. 469: 'We have seen that those who hold . . . in fee tail may pray aid'—*per* Hertford J. In Fitz. Comen, 29 (1304), a donee in tail was refused permission to pray aid of his issue in tail, on the ground *nemo est haeres viventis*—this seems to imply that the judge still thought the fee resided in the issue. See also note 23, *post*.

¹⁴ Bracton, f. 428, § 2. No question of praying aid from one's parceners arose if the inheritance had not been partitioned; for in such a case a parcener, sued alone, would 'except' against the writ that it does not name the other parceners, whereupon it would abate: no such exception lay against the writ, however, if the land had been partitioned: Bract. ff. 429b—430b.

¹⁵ Hengham, *Parva*, pp. 67—69. Hengham's two other instances of aid-prayer are *tenant by curtesy* praying aid of his late wife's heir by him and *rectors* praying aid of their patrons.

¹⁶ Hengham, *Parva*, p. 68: *aliter* if the plaintiff's claim arose after the partition and through the defendant's own act. In Fitz. Comen, 29 (1304), after much argument, it seems that a *co-parcener's* feoffee (possibly her son) was allowed to pray aid of another parcener's heir. Straithforward cases of one parcener obtaining aid of others include Fitz. Ayde, 179 (1302), 178 (1304), *Voucher*, 303 (1304).

¹⁷ Bracton, f. 341b, seems to imply that such accruer occurred only between *co-parceners* who have *not* partitioned; but at f. 374 he says that an inheritance, after being divided among co-heiresses or co-heirs, may come together again to a single heir through the death of the other parceners without issue. Glanvill, Bk. 7, c. 3, says the same. See also Bracton, f. 375, that such accruer occurs also if a parcener's heir dies without issue,

quasi-escambium, Hengham tells us that it exists only among co-parceners but says no more.¹⁸ Bracton solves the mystery. When a parcener loses by judgment land that has been assigned to him as his share of the inheritance, the residue of the inheritance must be partitioned *de novo*.¹⁹ The parcener who lost his land after duly praying aid of his co-parceners, obtained in this fashion a measure of compensation from them.

2. Akin to aid-prayer was the process later known as *Resceit*. Aid-prayer, as we have seen, enabled the possessor of land to summon a reversionary owner to his assistance in litigation which threatened their interests. *Resceit* occurred when the reversionary owner arrived in court on his own initiative and 'prayed to be received' in the action, in order to defend his right.²⁰ There are many hints that his anxiety thus to intervene was often prompted by a justifiable suspicion that a defendant who does not vouch or pray aid of his reversioner is probably acting in collusion with the plaintiff and has no real intention of seriously defending the action.²¹ Thus, when a life-tenant of land defaulted in a real action brought against him, his lessor would be received.²² And even those who were not strictly reversioners could avail themselves of the process: for a wife would be received if her husband made default in defending land of which they were joint feoffees (presumably on account of the *jus accrescendi*);²³ and, if a donee in tail defaulted, the heir of his body might be received likewise.²⁴ Moreover, there was in the early part of the century a somewhat ambiguous process—halfway, perhaps, between aid-prayer and *resceit*—which enabled a defendant's lord to speak for him

and that the rules are the same for joint feoffees (see also f. 262b). B. N. B. 959 (1224), shows accruer between male parceners in partible socage; so, also, perhaps, does Select Civil Pleas, S. S. 3, pl. 85 (1201). B. N. B. 1708 (1226), shows accruer between co-heiresses.

¹⁸ Hengham, *Parva*, p. 69.

¹⁹ Bract. ff. 341b, 430: When a parcener prays aid of his parceners the latter are summoned by writ: then, whether they come or not, the unity of right (which had been destroyed by partition) revives. The action then proceeds against them all as though they had never partitioned; and, if they lose, compensation in the form of a fresh partition is provided for the original defendant. For this Bracton cites the case of Adam Tusset, 9 & 10 Hen. III, from the Yorks and Lincs Eyre. See also Co. Litt. 173b, 174a, in Coke's day the position was explained by saying that a partition among co-parceners implies both a *warranty* and a *condition in law* whereby, if a parcener be subsequently evicted from his share by title paramount, the partition is avoided as to the whole inheritance.

²⁰ Bract. f. 393b. By the Statute of Gloucester, 1278, the process was extended so that a lessee might intervene to defend his right in a collusive action brought by some stranger against his lessor for the purpose of destroying the lease: see 2 P. & M. 109.

²¹ An early example of such collusion by a life tenant is Select Civil Pleas, S. S. 3, pl. 176 (1202), but the Justices in Bench righted the wrong. By Stat. West. II (1285), c. 3 such dangers were minimised by the provision of writs of entry for reversioners whose particular tenants had lost the land by defaulting in litigation, and for a wife whose husband had done so. Apparently this led to interventions, for purposes of delay, by persons who had no right in the land whatsoever: 20 Ed. I (1291—2), st. 3.

²² Fitz. *Resceit*, 186 (1303). Similarly the reversioner is received if a lessee or doweress is impleaded and fails to pray his aid or vouch him: Bract. f. 393b.

²³ Y. BB. 20 Ed. I (1292), R. S. 338; 21 Ed. I (1293), R. S. 262—266, 288—290 (part of counsel's plan for securing a maximum delay); Fitz. *Voucher*, 267 (temp. Ed. I: a defendant vouched husband and wife; husband defaults); Fitz. *Resceit*, 185 (1304—customs and services). Normally, of course, a married woman cannot plead without her husband: her words 'stand in his mouth' (Hengham, *Magna*, p. 24) and he is her guardian and *caput* (Bract. f. 429b).

²⁴ Y. B. 22 Ed. I (1294), R. S. 448; compare note ¹², *ante*.

if the lord's interests were at stake.²⁵ It seems that it applied even where the defendant was of villein status.²⁶

3. There was one other process, quite different from aid-prayer and *resceit*, which resembled voucher to warranty and which, indeed, went by that very name. If a person, involved in litigation, rested his case upon some crucial allegation of fact, and this fact that he so alleged was some formal act or decision of a court or official or was enshrined in some official record, he would *vouch* that court or official or record to warranty him. Thereupon, the authority that he had vouched would be summoned or consulted and, if it confirmed his story, he would win the day. Three passages in Bracton illustrate the employment of this procedure in *novel disseisin*:—a plaintiff may sometimes establish his free status, in answer to an exception of villenage, by vouching to warranty the *rolls* of the King's court;²⁷ a defendant who answers that he did not disseise 'unjustly,' but by a judgment, can vouch the *court* to warranty;²⁸ and a plaintiff, disseised a second time by the same disseisor and bringing a second action against him, needs no assize—for he may vouch to warranty 'the act of the Justices and the rolls.'²⁹ Other similar examples include a defendant who vouched to warranty the King's Council at Westminster;³⁰ a defendant who 'puts himself on the rolls' to establish his plea of estoppel by record;³¹ and a defendant in writ of right who 'vouches the court' in support of his allegation that a fine had been made in his favour before Ranulf de Glanville and other King's Justices—he cannot produce his chirograph evidencing the fine because his son-in-law has stolen it, so he says.^{31a} There are some early cases in which defendants vouched to warranty the shire court³² or some seignorial or other court having but

²⁵ See B. N. B. 631 (1231). Plaintiffs claim rent-service; defendant denies that he holds anything of them and states (without vouching *X*) that *X* is in seisin of the rent. *X* 'is present and acknowledges this,' and proceeds to defend the action. Compare Glanv. Bk. 10, cc. 6—8, as to the procedure where plaintiff claims to hold the land of one lord and defendant claims to hold it of another lord: if the lords are not present each is summoned by writ and may come and plead in place of his alleged tenant.

²⁶ Fitz. *Mordaunc*, 54 (1228); B. N. B. 1857 (1226—7), s.c.: defendant comes and says he is a villein and holds the land of *X* 'who is present and acknowledges' the plaintiff's claim: judgment for plaintiff. Compare Fitz. *Voucher*, 295 (temp. Ed. I), where a villein purchased land from *V* on terms which expressly preserved his status as *X*'s villein; *X* and the villein are sued for the land as co-defendants and are permitted to vouch *V* on the fiction that, since the villein's purchase vested the right in *X* he is deemed to be vouching on *X*'s behalf.

²⁷ Bract. f. 194—this where plaintiff alleges that his lord had previously recognised, in the King's Court, that he is free.

²⁸ Bract. f. 195b.

²⁹ Bract. f. 294b.

³⁰ Eyre Rolls, S. S. 56 (1218—19), pl. 315: he says that he disseised the plaintiff justly, in pursuance of an agreement made between them (as security for a payment in money, horses and hawks) and read before the king and his magnates in the King's Council. The case is adjourned to the Great Court (pl. 1133) which confirms that defendant took seisin by its judgment. *Held*, therefore, the action fails.

³¹ B. N. B. 861 (1232). Thereupon plaintiff in dower admitted that she had sued the same cause of action against him there before and that judgment had gone against her: so her plea is dismissed.

^{31a} Select Civil Pleas, S. S. 3, pl. 250 (1202).

³² B. N. B. 191 (1222): he vouched it because the husband of the plaintiff (who now claims dower against him) lost that land by writ of right in the shire court. *Held*: let the sheriff cause that plea to be recorded and send the record, by four knights, to the Justices.

a local jurisdiction.³³ And there is a curious affair in which a plaintiff 'puts himself upon the country and on the Justices of the Jews and vouches the said Justices to warranty.'³⁴ Sometimes a defendant charged with a disseisin, vouched the sheriff of a county to warrant that the sheriff had put him in seisin in pursuance of the King's writ.³⁵ And, by way of contrast to the common practice (sometimes abused) of 'vouching' or 'putting oneself upon' the rolls of the King's Court,³⁶ we read of a defendant who 'put himself on the book called Domesday' and thereby prevailed.³⁷

§ 9.—WARRANTY AS A BAR

On the principle that no man should be permitted to attack one whom he is bound to defend, it was only natural that a warranty which obliged *A* to defend *B*'s possession of certain land should operate in law to bar any action that *A* might bring against *B* to wrest the land from him. Accordingly, a warranty which enables *B* to vouch *A* ought also to bar *A* if he dares to sue *B* for the land. And if, when they die, the benefit and the burden of the warranty devolve upon their respective heirs, *A*'s heir ought likewise to be barred. The rule that one's warranty may bar one's heir had important and complicated consequences which begin to emerge at the close of the thirteenth century: under its influence the warranty gradually became a subtle and not very reputable device for enabling men to convey effectively lands to which they had little or no title. There are signs, even in the thirteenth century, that this development is at hand. But as yet the *express* warranty, which was destined to assume this doleful rôle, had not yet reached its full stature. Its elder brother, the homage-warranty, was already important as a bar at the beginning of the century, when subinfeudation was the predominant

³³ Select Civil Pleas, S. S. 3, Nos. 22, 30 (1201): defendant in novel disseisin vouched the Bishop's court alleging that it had adjudged the land to him in writ of right: so twelve come from that court and say that in fact the plea ended by compromise—not by judgment. Compare *ibid.* (1202), No. 169 (defendant in mortdancestor objected that plaintiff had formerly sued him in Court Baron by writ of right and had lost: *held*, the objection fails because he did not vouch that court to warranty). *Ibid.* (1202), No. 227: defendant in novel disseisin vouched the Burghmote of Lincoln to warrant that he entered the land by judgment of that court: it comes and testifies the contrary. *Ibid.* (1202), No. 234: heir vouches to warranty the Court of the Templars to support his contention, against widow claiming dower, that she quitclaimed it to him in that court for 20/- and a peach coloured cloak.

³⁴ Procedure without writ under Henry III, S. S. 60, pl. 12 (1234—5): his plaintiff was that he had been distrained on a charge of forging writs when chirographer to the Justices of the Jews, and he vouched them to warrant that all he did was make, at their order, a new writ to replace one that had been stolen.

³⁵ B. N. B. (1219), 76 (sheriff comes and produces the writ); B. N. B. (1217), 1326 (sheriff sends the writ).

³⁶ Evidently 'vouching the rolls' soon developed into a device for delaying a plaintiff in his action. By Stat. West. II (1285), c. 25, a defendant who vouched the rolls in novel disseisin, to support an exception of *res judicata* or that a higher writ was pending between the parties, was henceforth to be adjudged a disseisor at once, if nothing was found in the rolls to support his allegation—formerly the result had been merely that the assize was taken.

³⁷ Procedure without Writ under Henry III, S. S. 60, pl. 76 (1258): plaintiff against Peter of Savoy by the men of Witley alleging that they hold in ancient demesne; he denied this; the court consulted Domesday which proved him to be right.

form of conveyancing. But, as subinfeudation declined and express warranties grew increasingly popular, the homage-warranty soon became a rather anomalous vestige of the past.¹

(i) HOMAGE AS A BAR

We have seen that the receipt of homage implied a warranty, if that homage was done by the original feoffee or his heir to the original feoffor or his heir.² If such a feoffor or his heir sought to escape this warranty by refusing to accept the homage which the feoffment had reserved to him, the writ *Quod capiat homagium* enabled one to bring him to court and so force his hand.³ There was, however, a curious feature about the homage-warranty. One could bar one's lord more readily than one could vouch him. It was useless to vouch him and seek from him *escambium* unless one had oneself done homage to him:² many who wished to vouch their lords were therefore driven to the writ *quod capiat homagium*. Homage as a bar, however, extended a little further. If a feoffor received homage from his feoffee, that one act of homage operated as a bar in the next generation also—i.e., it affected the immediate heirs of the parties as well as the parties themselves.⁴ There are, moreover, occasional indications that the 'ancestral' rule, whereby homage implied no warranty unless it was done between a feoffor and his feoffee or between their respective heirs,⁵ applied originally only to voucher and *escambium*; so that homage, whether 'ancestral' or not, would always bar the person who actually received it.⁶

In his plea that the plaintiff was barred by homage, a defendant would allege the homage that had passed between them or their ancestors and then, perhaps, would add by way of emphasis that the plaintiff ought

¹ See also 2 P. & M. 291.

² *Ante*, vol. 8, pp. 278—279. If one *vouched* in virtue of homage one had to allege that the vouchee had actually received one's homage: Bract. f. 382. So even if he is one's feoffor: Fitz. *Garrantie*, 90 (Ed. I).

³ Glanvill, Bk. 9, c. 5; Bract. ff. 82b—83b ('*quare non capiat homagium*'). But the court will not compel him to accept homage if he can prove that the feoffment was void, e.g., for want of seisin in feoffor's lifetime: *ibid*. See further, B. N. B. 53 (1219), 165 (1222); Co. Litt. 101a ('*de homagio capiendo*').

⁴ Bract. f. 394b; B. N. B. 671 (1232), 1100 (1225); *Exceptiones ad cassandum Brevia*, Law Tracts, pp. 177—178 (tenant's heir can plead the bar). That the lord's heir is barred, see further, Fitz. *Garrantie*, 90 (Ed. I); Bract. ff. 321b, 322—322b (tenant by curtesy alienates for homage—heir barred); also Bracton's treatment of the maxim 'cannot be lord and heir' (*post*, pp. 96—98) invariably assumes it. See also Bract. f. 79; when either dies the homage holds in the survivor, fails in the deceased, but holds in the person of his heir.

⁵ *Ante*, vol. 8, pp. 278—279; Fitz. *Garrantie*, 90 (Ed. I).

⁶ E.g., F. N. B., 144 O (if lord accept homage of one in possession he is barred from bringing writ of escheat against him); Bract. f. 78b (infant receives homage impliedly *salvo jure cujuslibet* and so is not barred from reclaiming the land if in fact another has greater right); Hengham, *Magna*, pp. 49—50 (if one who has right takes homage from a wrongful possessor he is thereby barred but his heirs are not). From this it would seem to follow (i) that even homage received from the feoffee's assignee (Bract. f. 81) effectively barred the lord, (ii) that the assignee of a seignory was barred on taking the tenant's homage; but in neither case did such homage attract voucher or *escambium* (*ante*, vol. 8, pp. 278—279).

therefore to warrant him against others,⁷ or that 'one cannot be at once lord and tenant of the same tenement.'⁸ This latter maxim and its analogue 'Homage expels the demesne'⁹ signify that, so long as the homage endures, the lord is barred from asserting any claim to possession of the land in respect of which it was done. But there were several circumstances in which homage would disappear, so that the feoffor-lord or his heir would be barred no longer; and, as one would expect, an entire failure of the feoffee's heirs was one of them.¹⁰ Thus did Bracton and Glanvill¹¹ reconcile with the homage-bar the lord's right of escheat. But each of them emphasised that, if homage is to vanish for default of heirs, the failure of heirs must be complete. And this led Bracton into a difficulty when he came to land given *in tail* or *in maritagium* which, as all men knew,¹² should ordinarily revert to the donor or his heirs on failure of the *lineal* heirs of the donee.¹³ What if the donor or his heir have received the homage of his tenant in tail or *in maritagium*? Does the homage-bar operate, even here, to bar him until all the donee's heirs, lineal and collateral, are exhausted? If so, there will be chaos indeed. Yet Bracton's rules about the persistence of the homage-bar had made no exception for cases such as this. Accordingly, when he comes to the entail¹⁴ and to *maritagium*,¹⁵ he must add some special provision for them. And this he does. For them, on the mere failure of lineal heirs, *evanescit homagium*. This important conclusion was no easy, self-evident development in Bracton's age. Homage and the homage-bar were very high matters, not easily to be whittled down by exceptions. Glanvill had

⁷ *E.g.*, B. N. B. 671 (1232), homage alleged between their parents; B. N. B. 1100 (1225), same between their 'ancestors.' See also Bract. ff. 322—322b, § 2.

⁸ Bract. f. 321b. This maxim is also employed, without any express mention of homage, to prove that if *A* enfeoff *B* who enfeoffs *C*, etc. who enfeoffs *A* this last enfeoffment is void: Bract. f. 24; Fleta, Bk. 3, c. 12, § 3.

⁹ Fleta, Bk. 3, c. 12, § 3 (homage expels the demesne and preserves the service); cf. Bract. 279b (homage and demesne *non compatiuntur*).

¹⁰ Bract. ff. 20b, § 1 (*quia homagium evanescit haeredibus deficientibus ubique*), 23, 24, 64, 80—82, § 12. The others include a surrender by the tenant or some act of disherison by him. Bracton emphasises (f. 23) that, on failure of the tenant's heirs, the lord does not take as quasi-heir so as to be bound by the tenant's warranties. See also Fleta, Bk. 6, c. 1, § 11 (*evanescit homagium*).

¹¹ Glanvill, Bk. 7, c. 1.

¹² Even Glanvill said a good deal about *maritagium* (Bk. 7, cc. 1, 8; Bk. 9, c. 2). He himself had acquired lands in *liberum maritagium* from his father-in-law on his marriage (Beame's edition, pp. viii—ix). But he seems not to know the estate tail *simpliciter*.

¹³ The fact that Glanvill does not seem to have Bracton's difficulty about *maritagium* tends to suggest that *maritagium*, in Glanvill's day, was for the donee and his (or her) heirs *general*: see further, note ¹⁵, *post*. When Bracton wrote, the word '*maritagium*' was presumed to mean only heirs *of the marriage* unless the gift said the contrary: Bract. ff. 65, 22—22b.

¹⁴ Bract. f. 279; B. N. B. 250 (1227), donor took homage from donee in tail who then died without issue: *held*, donor can recover from donee's brother despite the homage. Cf. Fleta, Bk. 3, c. 12, § 3.

¹⁵ Bract. f. 21b, § 3. Bracton's '*evanescit homagium*' here, makes nonsense of his and Glanvill's rule that, for *maritagium*, one must be careful not to take homage (until the third heir) lest one be barred of one's reversion on the failure of the donee's issue: see *post*, pp. 92—93. Perhaps the custom of avoiding the homage of one's tenant in *maritagium* dates from a time when marriage gifts ordinarily comprised the donee's heirs *general* (cf. note ¹³, *supra*).

been doubtful whether even the total failure of a tenant's heirs would always permit escheat to the lord if homage had been taken.¹⁶

The high repute of the homage-bar was probably one of the factors which impelled men to persuade their lords to take homage of their heirs-apparent,¹⁷ though such homage in advance had other possible advantages.¹⁸ Even to take the homage of one's *serf* in respect of land granted to him precluded one and one's assigns from ejecting him; and, if one ejected him nonetheless, one was barred from objecting villenage in the action that he might bring.¹⁹ Other more obvious illustrations of the homage-bar include the case of a plaintiff in writ of right who seems to resile from his action by taking the defendant's homage when the issue between them has already been committed to the grand assize;²⁰ a specimen writ when a warrantor, vouched by a defendant, comes into court and says, in bar of the action, that the plaintiff has taken his homage in respect of the contested land;²¹ and some decisions as to the effect of homage upon a widow's dower.²²

Bracton's main interest in the homage-bar was significant of things to come: surely, the fact that the homage-bar binds one's heir may enable husbands to dispose effectively of their wives' lands. Ordinarily, of course, the husband who purported to convey his wife's land to a stranger (unless by a fine in which she concurred)²³ conferred but a revocable

¹⁶ Bk. 7, c. 16. He puts this question in the troublesome case of the bastard who dies without issue. The one thing he feels sure about is that the feoffor-lord *cannot* take, on account of the homage. It is significant, perhaps, that thirteenth century writers were much inclined to associate escheat from a bastard-feoffee with reversions upon entails—e.g., Bract. f. 20b, Hengham, *Parva*, p. 62; Fleta, Bk. 3, c. 12.

¹⁷ E.g., B. N. B. 428 (1230), 671 (1232). Such homage probably operated to preclude the lord both from later alleging bastardy against the heir-apparent by writ of escheat (Bract. ff. 66b, 418), and from withholding seisin from him on the ground that a possible nearer heir exists.

¹⁸ Homage in advance without seisin did not transfer the fee: B. N. B. 428 (1230). But if A's heir-apparent, who had done homage in advance, predeceased A leaving a child of his own, when A died that child would inherit from A to the exclusion of A's younger sons: 2 P. & M. 282. Homage done in advance by an infant heir-apparent who also obtains some sufficient seisin, concurrently perhaps with his father, as in B. N. B. 671 (1232), precludes the lord from subsequently claiming wardship over him: F. N. B. 142 E. Contrast cases in which father enfeoffs younger son for his homage and the feoffee at once does homage to eldest son (as well as to father-feoffor): here the homage in advance served to show, in early times when this was material, that the feoffor had alienated with his heir's consent: Select Civil Pleas, S. S. 3, pl. 56 (1200).

¹⁹ Bract. ff. 24—24b.

²⁰ B. N. B. 1944 (1221): the grand assize comes but is dismissed because of the homage. Compare B. N. B. 838 (1234), and Maitland's footnote thereto: a mesne lord who sues writ of right against his tenant thereby waives his seignory.

²¹ *Fet Assaver*, Law Tracts, pp. 82—83: this is a writ issued, after plaintiff and warrantor have 'put themselves on the country' as to the homage, for summoning an inquest to determine the point. See also *Exceptiones ad Cassandum Brevia*, Law Tracts, pp. 177—178 (same if warrantor's immediate ancestor did homage to plaintiff).

²² Doweress does not do homage for her dower: Glanv. Bk. 9, c. 2. But if her husband, having specifically endowed her of Blackacre, conveys Blackacre to X for his homage it seems that the homage will bar his heir (implied warrantor of her dower) from recovering it for her in demesne: B. N. B. 1736 (1226). *A fortiori*, if she takes X's homage after husband's death: Fitz. *Dower*, 63 (1338).

²³ Bract. f. 321b: such a fine would effectively bar her *cui in vita*. Even without a fine, his conveyance *honestas causa* bound her—e.g., his grant to their common son or in *maritagium* with their daughter: *ibid.*; cf. B. N. B. 1569 (1222).

title: if she outlived her husband she would be able to recover the land by writ of entry *cui in vita*; ²⁴ and if she predeceased him her heir could do likewise. ²⁵ But Bracton's point is this: if the husband conveyed the land by subinfeudation for the grantee's *homage*, the husband's heir will eventually inherit that homage from him; moreover, the husband's heir will almost certainly be the wife's heir also—*e.g.*, the eldest son of their marriage. Accordingly, any attempt by their common heir to sue for the land *after both of them are dead* will be barred by the homage, 'lest he be lord and tenant of the same tenement.' ²⁶ This subtle method of employing a warranty-bar, in order that one who has no title can nevertheless make an indefeasible conveyance, foreshadows precisely the system of a later age, in which *express* warranties will be used for a like purpose. But as Bracton was well aware, it was not always effective. It failed, for instance, when husband's heir and wife's heir were not the same individual (as where husband or wife had a son by a previous marriage), ²⁷ or where the wife outlived her husband and herself recovered the land from his grantee—for her successful action would destroy the husband's conveyance and, with it, the homage that was annexed to it; ²⁸ it failed also, perhaps, if the wife died first and the common heir sued whilst the husband was still living. ²⁹ Moreover—and here we have a reason why this device will not survive the statute *Quia Emptores*—it was inapplicable if the grantee was to hold direct of the chief lord; since here no homage could be reserved to the husband-grantor. ³⁰ Evidently, therefore, one who stooped to purchase a wife's land from her husband, even by a subinfeudation involving homage, was not entirely secure: he will be wise, if she outlive her husband, straightway to do homage to her also, if she can be persuaded to receive it; ³¹ for homage done to him (or her) who had power to invalidate one's title was an effective bar. ³²

Bracton's rules about the husband who attempts to alienate his wife's lands were intended to apply not only to her inherited lands, but also to

²⁴ An early example is Select Civil Pleas, S. S. 3, pl. 90 (1202): *cui in vita* by widow for her *maritagium*.

²⁵ Holdsworth, 3 H. E. L. 22: her heir's writ of entry was called *sur cui in vita*; but for an entailed interest he would bring *formedon*. Bracton is inclined to think that the heir may be barred by her *laches* if she outlive her husband and die without having brought *cui in vita*: ff. 322—322b, § 2.

²⁶ Bract. f. 321b.

²⁷ Bract. f. 322 ('as in the iter of the county of York').

²⁸ Bract. f. 321b: and the homage, once it has been so destroyed by judgment, never revives; so on her death their common heir is in no wise barred. But husband's heir (though also her heir-apparent) if vouched by defendant would be liable to make *escambium* from any assets descended: *ibid*.

²⁹ Bract. f. 322, citing a decision of Martin de Pateshull (1219) where defendant had at first contended (Eyre Rolls, S. S. 56, pl. 167) that the heir had no right to sue so long as the husband (entitled by the curtesy) was still alive. When tenant by curtesy alienated in fee some thought it gave the heir an immediate right to recover possession: it gave him at least an immediate action in which alienee would be adjudged entitled *pur autre vie* only: Bract. f. 31.

³⁰ Bract. f. 322.

³¹ In B. N. B. 671 (1232), defendant alleged this against her heir.

³² Bract. ff. 24, 66b. Here is a foretaste of the later system of bar by quitclaim with express warranty.

her *maritagium*.³³ The wife's *maritagium* has a special interest in relation to the homage-bar, as we shall see. It was, moreover, the parent of the modern entail and marriage settlement. *Maritagium* was property which the wife's father or other relative settled on her upon the occasion of her marriage. When it was land³⁴ it was commonly conveyed to the husband and wife or 'with' the wife to the husband;³⁵ and the words used might specifically include her heirs alone or, more frequently, their common heirs (issue of the marriage).³⁶ And if no heir were specified, the words '*in maritagium*' sufficed to show that only their common heirs could inherit from them.³⁷ There were occasional variations;³⁸ but the foregoing were the usual forms of marriage gift. And here is a peculiar point: although the husband seems invariably to have been named as though donee, a gift *in maritagium* operated at law merely as a gift to the wife.³⁹ Accordingly, although the husband would have his curtesy for life if she predeceased him and there were issue of the marriage, failing such issue the land reverted immediately to the donor or his heir when she died.⁴⁰ This right of reversion to the donor and his heirs was evidently of great interest and importance. It was naturally regarded as a kind of escheat; for gifts *in maritagium* were invariably made by subinfeudation. But it differed from escheat in that the donor's reversion was to operate on the failure of a particular class of heirs (the *lineal* heirs of the donees), not merely on the failure of all heirs, lineal and collateral. Glanvill informs us that, in order to protect this right of reversion, no homage is received of lands given in *maritagium* until they reach the wife's third heir; for, says he, if homage were received for it, 'then it would never afterwards revert to the donor or his heirs, as we have

³³ Bract. f. 321b.

³⁴ It might be money or goods: B. N. B. 442 (1230), 552 (1231), 646 (1231), 683 (1232), where her father promised also to build a barn. If money or goods it was within the jurisdiction of Court Christian. In Glanvill's day even actions for land-*maritagium* could be tried in Court Christian if against donor or his heir: Bk. 7, c. 18.

³⁵ Glanvill describes *maritagium* as a gift with a woman to a man (Bk. 7, c. 1), so sometimes does Bracton (*e.g.*, f. 277b). But whichever form of words was used the effect was the same: Bract. f. 21.

³⁶ Bract. ff. 20b, 22b, 277b. The difference, of course, was that even issue of her second marriage might inherit a *maritagium* which spoke of 'her' heirs *simpliciter*, and her second husband get curtesy therefrom. There was often no documentary record of a marriage gift: Bract. f. 22; Fitz. *Taile*, 30 (1303). Hence there was much litigation as to what heirs it had comprised. Bracton, f. 277b, gives such a case (from Pateshull's last *iter*) where the assize was turned into a jury on the point; other examples are B. N. B. 1921 (1227), 487 (1231), s. c., and 855 (1234), where the doctrine of *possessio fratris* arose.

³⁷ *E.g.*, Fitz. *Taile*, 31 (1304); Fleta, Bk. 3, c. 11.

³⁸ *E.g.*, 'To wife and her heirs if she have an heir of her body': B. N. B. 948 (1224). Bracton even included 'to husband and wife and his heirs' (f. 22b), and said (f. 22) that a gift to a girl *ad se maritandum* is also a kind of *maritagium*, whether for her life only or comprising her heirs or the heirs of her body. Fleta, Bk. 3, c. 12, said that it might expressly include the donee's assigns (and so be alienable).

³⁹ B. N. B. 629 (1231), 1008 (1224); Bract. f. 65; Fleta, Bk. 3, c. 11. Compare Hengham, *Magna*, p. 24, who says that, as in gifts to husband and wife jointly, 'the husband has as much right in the land as the wife or more.' If they are subsequently divorced, he must return to her any land or money he has had from her father in *maritagium*: B. N. B. 552 (1231); Hengham, *Parva*, p. 64.

⁴⁰ Select Civil Pleas, S. S. 3, pl. 184 (temp. John); B. N. B. 105 (1220), 487 (1231), 1071 (1225); Fleta, Bk. 3, c. 12 (like a gift to a bastard).

explained.⁴¹ He clearly has in mind his earlier statement⁴² that the homage-bar persists until all the tenant's heirs fail, near and remote. To take homage, therefore, would in substance convert the *maritagium* into a fee simple and so destroy that special right of reversion which would otherwise accrue on failure of the mere lineal issue of the marriage.⁴³ Bracton has the same story to tell, but he is less confident of the reason for it: he says, at first, with Glanvill, that the reason why homage ought not to be done until the third heir is 'on account of the reversion to the donor if the heirs fail';⁴⁴ but later on he states that *maritagium* may revert to the donor, for default of heirs of the marriage, 'whether homage has intervened or not,' since thereupon any homage will disappear.⁴⁵ It is clear that his latter *dictum* prevailed; for, although the following years provide occasional obscure hints that Glanvill's rule is sometimes vaguely remembered,⁴⁶ in practice donors and their heirs far from attempting to avoid the receipt of homage are now trying to enforce it.⁴⁷ And this *volte-face* was encouraged, as we shall see, by the fact that those who do homage must do service also.

Maritagium was affected by a second peculiar rule about the third heir; but this second rule, unlike that which deferred the doing of homage, applied only to gifts expressed to be *in liberum maritagium* or in frankmarriage. When so framed, the gift implied that the donees and their heirs were to hold the land free of all service, whether to the donor or his heirs or to the chief lords, until the third heir of the marriage.⁴⁸ Never-

⁴¹ Bk. 7, c. 18; see also Bk. 9, c. 2; but *fealty* must be done by all: Glanv. Bk. 7, c. 18; Bract. f. 24, § 4. Fealty received by a parson in respect of the lands of his church bars him in the assize *utrum*, since he cannot take homage for them; but ordinarily fealty is not a bar: *Exceptiones ad Cassandum Brevia*, Law Tracts, pp. 177—178; Fitz. *Juris Utrum*, Nos. 12 (1319), 13 (1319). ⁴² Bk. 7, c. 1.

⁴³ There are other signs that *maritagium* originally became a fee simple, inheritable by heirs general, once homage had occurred; e.g., Glanv. Bk. 7, c. 18 (an action to recover *maritagium* from a stranger is like a plea of dower until the third heir has done homage, for one must produce one's warrantor). But possibly Glanvill was thinking primarily of the marriage gift to donee and heirs *general*: see footnotes 13, 15, *ante*. Compare Coke's statement, in his discussion of frankmarriage (Co. Litt. 21a—b), that all estates tail, including *in libero maritagio*, were in fee simple at common law.

⁴⁴ Bract. f. 21b. See also B. N. B. 295 (1228): donor's son 'need not' take homage of donee's grandson 'unless he wish.'

⁴⁵ Bract. f. 23. Even in f. 21b, he implies the same thing: if the third heir does homage and his heirs fail thereafter, *evanesceit homagium*.

⁴⁶ Britton's only reference to it is his statement (Bk. 3, c. 4, § 13) that, among the possible defences which a lord may raise when sued by his tenant for refusing homage, is that the tenement 'was given *en mariage* and therefore he expects the reversion until the appearance of heirs.' Fleta, Bk. 3, c. 11, copies Bracton's statement that receipt of homage may repel the reversion, but applies it only to *free maritagium* (see next paragraph).

⁴⁷ E.g., B. N. B. 207 (1222); Fitz. *Droyt*, Nos. 52 (1263), 55 (1222), 60 (1231).

⁴⁸ Glanv. Bk. 7, c. 18; Bract. ff. 21—21b (it may even be *partly* free: e.g., saving the forinsec service; it implies an undertaking to acquit, since it cannot oust the chief lord's power to distrain unless he confirmed the gift); Co. Litt. 21a, b (if it reserves a rent, that rent is ineffective until the third heir, e.g., Fitz. *Formedon*, 63 (1285)); B. N. B. 241 (1227), 811 (1233); Fitz. *Droyt*, Nos. 55 (1221), 60 (1231). Even the third heir need not do homage and service till of age: B. N. B. 207 (1222). Sometimes gifts in *liberum maritagium* contained words which caused a difficulty, e.g., 'for their homage and service' (the homage prevails: Bract. f. 22b; Fleta, Bk. 3, c. 11, § 3); or perhaps the gift contains an express warranty to the husband and his heirs general and reserves a yearly service to donor and his heirs (the frankmarriage prevails: Fitz. *Taile*, Nos. 25 (1305), 31 (1305)).

theless, once homage was done by tenant in *liberum maritagium* this freedom from service ended. It ended even if one who was not yet third heir (and so was not liable to do homage) was stupid enough to do homage to the donor or his heir;⁴⁹ for one who did homage for a tenement was thereby estopped from denying that he and his heirs ought to render the services due from it. Here we have the reason why, once men realised that to take homage from a tenant in *maritagium* did not endanger their reversions, those who had reversions took homage readily from their tenants in frankmarriage if they could get it. Henceforth, moreover, there was no longer any point in litigating about the homage except as regards a *maritagium* that was *liberum*. The unlabelled variety of *maritagium* thus became indistinguishable from the new estate tail, and likely to be forgotten. And those who, in later times, write of the thirteenth century will be inclined to think of frankmarriage as though it was the only form of *maritagium* and the only true begetter of the modern entail.⁵⁰

There was besides *maritagium* another case where one was recommended to defer taking homage until the third heir. Maitland calls it 'tenure in *parage*.'⁵¹ When co-heiresses inherited land, it would be partitioned among them so that each obtained a fair, equal share of the inheritance.⁵² But, before the land was thus divided, the *eldest* parcener would do homage to the lord of the fee on behalf of herself and her sisters;⁵³ and even in the partition itself there were some respects in which her seniority gave her precedence.⁵⁴ For our purposes, however, the important point is that she alone and her heirs after her did the homage and due service to the chief lord in respect of the whole inheritance; and the younger sisters and their heirs did their shares of the service to her. But they owed her no homage until the third heir.⁵⁵ Here, then, we

⁴⁹ F. N. B. 155 K; B. N. B. 664 (1231), 747 (1233); Fitz. *Droyt*. 52 (1263).

⁵⁰ *E.g.*, Fleta, Bk. 3, c. 11 (*ante*, footnote ⁴⁶); Co. Litt. 21b; Challis, *Real Property*, 2nd ed., pp. 12—13. Even the Statute *De Donis*, 1285, specifically mentions only *liberum maritagium*. Holdsworth, 3 H. E. L. 111—112, does not misrepresent *maritagium* except in asserting (at p. 111) that, in gifts of ordinary (as opposed to 'free') *maritagium* 'the donee might be bound to do homage to the donor.' See also 1 B. N. B. 133, n. 5, where Maitland criticised modern misconceptions about 'frank-marriage.'

⁵¹ 2 P. & M. 261, 274—276.

⁵² Bracton, ff. 71b—73b, 75b, gives the procedure in great detail. Great care was taken to secure equality of treatment for all. And finally, failing an agreed division, one of the equal parcels which the assessors had determined was allocated to each parcener by lot—by Littleton's day Bracton's illiterate layman had given place to little balls of parchment drawn from a hat held by an indifferent man: Litt. s. 246. There was also a hotspot rule for any sister to whom deceased had given lands in *maritagium*: Bract. ff. 22, § 4, 76b—77; B. N. B. 934 (1224), 1018 (1224); Fleta, Bk. 3, c. 11, § 3.

⁵³ Bract. ff. 71b, 78b, 79; B. N. B. 869 (1232). Compare Glanv. Bk. 7, c. 3, that her husband does the homage in her stead. Unlike Bracton, Glanvill did not allow a female heir to perform homage—Bk. 9, c. 1. Bracton allowed her husband to do homage (f. 78); but there was an objection to the husband's homage (the homage-bar?) unless there was already a child of the marriage to ensure him curtesy: Select Civil Pleas, S. S. 3, pl. 200 (1201); F. N. B. 257, F; Litt. s. 90.

⁵⁴ Her *aesnetia* was chiefly a right to the chief messuage, her sisters receiving due compensation: Glanv. Bk. 7, c. 3; Bract. ff. 73—73b, 75, 75b—76; B. N. B. 1707 (1226). In B. N. B. 869 (1232) it was pleaded that she ought to do homage for all 'by reason that she is *de aesnetia*.'

⁵⁵ Glanv. Bk. 7, c. 3; Bract. f. 78; B. N. B. 441 (1230); Fitz. *Droyt*, 64 (1226); *Statutum*

have again a case of subinfeudation within the family—this time by operation of law—where the new lord must beware of the homage-bar. But this time, as Bracton explains, the risk of taking homage is that it would bar the eldest sister and her heirs after her from benefiting by *accruer* (he does not call this ‘inheritance’) in case one of her younger sisters should die without issue or that issue fail.⁵⁶ Britton, too, recognized this hope of *accruer* as a valid excuse for refusing to take homage from one’s *parcener*.⁵⁷ But Maitland has traced to him responsibility for a swift decline of *parage* tenure at the close of the century:⁵⁸ by Coke’s day it had become an unheard of thing that an eldest sister, after partition, should do homage for all.⁵⁹ Among brothers, inheriting as co-heirs, these problems about homage had no place: only *socage* could be partible among males; and, to *socage*, homage was theoretically inapplicable.⁶⁰

Why had a daughter’s *third* heir this importance in *parage* and in *maritagium*? Why were the rules so framed as to imply that, once the land had reached the *third* heir, the reversioner who received homage of him was unlikely to be hurt by the homage-bar? Bracton, in very diffident fashion, offered the suggestion that ‘when there be three heirs, from heir to heir, they can scarcely fail thereafter.’⁶¹ Once the daughter’s issue have reached the third generation, there is little chance that her lineal heirs will completely fail; so the reversioner will, by then, have given up all real hope that the land will ever revert to him or his heirs. Maitland, however, believed that the third heir rule probably derived from some long forgotten system of inheritance, wherein all sons or daughters were co-heirs of their father, but could not partition his lands till the third or fourth descent.⁶² There is, I think, a third possibility, namely, that our early law knew limits beyond which, as generation succeeded generation, the bonds of kinship lost their force or were at best too attenuated to withstand opposition, and that, for purposes of

Hiberniae de Coheredibus, 1229—1230 (in fact a writ in answer to an Irish enquiry about the English law as to co-parceners).

⁵⁶ Bract. f. 78. This right of *accruer* or *jus accrescendi* means that the share of her whose issue fails is divided equally among the survivors or their heirs, and it applied also among male co-heirs and among co-owners by feoffment: Glanv. Bk. 7, c. 3; Bract. ff. 262b, § 3, 276, 375, § 5; B. N. B. 1708 (1226). If homage *has* intervened, the eldest sister cannot retain what accrues to her from the deceased’s share: it will pass from her ‘to lower heirs’: Bract. f. 78. This presumably means the eldest’s child if any or (failing such) her surviving sisters or their heirs—as under the ‘lord and heir’ rule (*post*, pp. 97—98).

⁵⁷ Bk. 3, c. 4, § 13. But perhaps he implies that it is only an excuse where the *parcener* who offers homage has as yet no issue.

⁵⁸ 2 P. & M. 276: Britton encouraged chief lords to take homage from all the sisters in order to ensure wardships and marriages from each share.

⁵⁹ Co. Litt. 67a, b: each does her own homage to the chief lord.

⁶⁰ Bracton, ff. 77b, 85b, said that it was an abuse that homage was sometimes done for a *socage* tenement. See also Mirror of Justices, S. S. 7, p. 75 (if done it is void as in fraud of the law). It seems that homage was done for *socage* lands in Select Civil Pleas, S. S. 3, pl. 192 (1201); also in B. N. B. 1565 (1222), with the purpose of defrauding of his share a younger brother who was abroad *ad scolam*.

⁶¹ Bract. f. 78; also f. 21b to the same effect.

⁶² 2 P. & M. 289, n. 7.

inheritance (though not necessarily for all purposes), the limit was the third or fourth descent from the nearest common ancestor. Thirteenth century law contained several anomalies which suggest that men once regarded kinship as something to which limits might be set.⁶³ And if we may suppose some ancient usage, whereby kinship and inheritance were formerly restricted to persons descended from a common grandparent or great-grandparent, the third heir rule of the thirteenth century may well be its memorial.⁶⁴

There was one other instance of the homage-bar which Glanvill and Bracton evidently considered to be particularly interesting and important.⁶⁵ In the days when primogeniture was rapidly ousting older systems of inheritance, men were naturally anxious to make special provision for their younger sons. Bracton's Note Book and the other printed records of litigation in the early thirteenth century leave one with a very definite impression that much of the conveyancing of that time was done to this end; and, be it remembered, conveyances of that period were ordinarily subinfeudations.⁶⁶ A landed father who so enfeoffed a younger son of a portion of his land would be particularly anxious to preclude his eldest son from claiming to inherit that portion to the prejudice of the younger son and his descendants. Accordingly, the father who enfeoffed his younger son did so 'for his *homage*,' and ceremoniously received homage from him at once. In this early part of our period, when charters and express warranties had not become a normal feature of conveyancing, homage was the only obvious way of building up a warranty that would bar one's heirs after one. Gifts in *maritagium* to daughters did not raise this problem, for *maritagium* enjoyed the peculiar privilege of an implied warranty irrespective of homage or charter.⁶⁷ Thus it came about that, whereas a gift of *maritagium* to one's daughter was safe enough without any homage, a feoffment to one's younger son was not

⁶³ E.g., (i) the mystery which limited mortdancestor to the 'degrees' and so excluded grandsons and cousins of deceased: 2 P. & M. 56; (ii) the rule that, in writ of right between kindred, there was neither battle nor grand assize (unless one claimed by feoffment) if the parties were within the fourth descent from the common ancestor: Fitz. Droyt, 51 (1285), 62 (1234), 63 (1220); cf. Glanv. Bk. 2, c. 6, and Bract. ff. 282, 283b, where the rule is given but not its precise limits; (iii) the rule that 'privies in blood' cannot sue each other by mortdancestor or cosinage but only by writ of right: Glanv. Bk. 13, c. 11; Bract. ff. 281, 282, 261b, 266b—267, 278b; (iv) Bracton's rule that the writ of cosinage (*de consanguinitate*) went as far as the grandchild's grandchild 'who is called cousin (*consanguineus*),' ff. 254, 281; cf. 2 P. & M. 57, n. 2; (v) the almost tiresome thoroughness with which Bracton classifies heirs according to their various degrees of proximity; (vi) the archaic forisfiliation: Glanv. Bk. 7, c. 3; 2 P. & M. 282, 436, n. 2.

⁶⁴ The third heir rule appears only where lord and tenant were descendants of a common ancestor. Evidently, therefore, the fear of homage was originally a fear that it would bar the lord from inheriting in the event of the failure of the tenant's lineal heirs.

⁶⁵ Glanv. Bk. 7, cc. 1, 16; Bk. 13, c. 11; Bract. ff. 64, 65b—66, 277, 279—279b, 282. Also Hengham, *Magna*, p. 49, n. ⁵ (one MS. only); Britton, Bk. 6, c. 2, § 11; Fleta, Bk. 3, c. 12, § 3; Bk. 6, c. 1, §§ 15, 16.

⁶⁶ Throughout Bracton's treatise, for instance, it is evident that when he speaks of a gift or sale he means a subinfeudation, apart from very occasional exceptions. See also Maitland, 1 B. N. B. pp. 133—134.

⁶⁷ Bract. f. 22 (the wife and her issue are in themselves a sufficient charter); also ante, vol. 8, p. 281.

safe unless one took his homage and thereby barred one's heir. It is not difficult to imagine the complicated mixture of family and tenurial relationships which necessarily followed if, in each succeeding generation, every parent conveyed a tract of land in fee to each of his younger sons to be held of him and his heirs with the result that, on his death, the seignories descended to his firstborn, who thus became the lord of the younger sons.⁶⁸ This brings us to our problem. The father is dead. His eldest son, *A*, has inherited from him and now stands lord of the fees which his younger brothers, *B* and *C*, hold of the father's gift. Next, let us suppose, *C* dies, leaving no issue of his own to inherit his fee. Who will inherit from *C* in such a case? By the strict rules of inheritance, his eldest brother *A* must be his heir. And this he is, as against the outside world. If, for instance, some stranger has intruded upon the land since *C* died and now refuses to give it up, the proper person to recover it from him by *mortdancestor* is *A*.⁶⁹ But once *A* has recovered the demesne, he has no right to retain it; for he, as his father's heir, is lord of that fee, and his father received homage for it. '*One cannot be at once lord and heir of the same tenement.*'⁷⁰ Accordingly, he who would have been *C*'s heir if *A* were dead can, if he will, recover the land from *A* by writ of right;⁷¹ and, having recovered it, he has a firm title to the fee. In our example, this next heir who can so recover from *A* is the child of *A*, if he have one; if he have none, it is brother *B*.⁷² In short, on *C*'s death without issue, whereas *A* should recover the fee from a stranger, *A*'s

⁶⁸ The pedigree and descents in many of the cases in Bracton's Note Book are problems in themselves. See e.g., Maitland's footnote to B. N. B. 657 (1231).

⁶⁹ Glanvill said the contrary: Bk. 13, c. 11. But Bracton is very emphatic (ff. 65b, 66, 277) and so is Fleta, Bk. 6, c. 1, § 16; see also B. N. B. 1105 (1225), and footnote ⁷¹, *post*. There has evidently been a recent change in the law. Likewise, if the land is vacant, *A* is entitled to take the first seisin, being lord of the fee: Bract. ff. 252—252b. If the next heir (ignoring *A*) has already taken seisin, *A* can perhaps bring writ of right against him (Bract. ff. 65b—66, *dubitante*) but cannot forcibly disseise him: B. N. B. 1224 (1238—9).

⁷⁰ See 2 P. & M. 284—293, for Maitland's account of the rule 'cannot be lord and heir, and his theory that it was responsible for 'the curious doctrine' that ascendants cannot inherit: he sees in it (*ibid.* 290) 'a struggle against the effects of primogeniture.' See also Woodbine's note to Glanv. Bk. 7, c. 1, at pp. 224—225. Another form in which the rule was sometimes expressed is 'Homage expels the demesne and retains the service': Bract. f. 24; Fleta, Bk. 3, c. 12, § 3. Bracton, f. 77, even used the theory by analogy when dealing with co-heiresses and the rule (*ante*, pp. 94—95) that they did no homage in order to preserve their *jus accrescendi*—'lest they be *quasi* lords and heirs.'

⁷¹ That the next heir's proper remedy is writ of right against *A*, see Bract. ff. 66, 277 (citing a decision of 1219), 282; Fleta, Bk. 6, c. 1, § 16; Eyre Rolls (1221), S. S. 59, pl. 560 (cannot bring *mortdancestor* against *A*'s feoffee); B. N. B. (1226), pl. 1694 (can bring writ of right against *A*'s feoffee who will then vouch *A*); B. N. B. (1231), pl. 564 (cannot bring *mortdancestor* against stranger—writ of error); B. N. B. (1224), pl. 949 (nor writ of right against stranger); B. N. B. (1233), pl. 774 (cannot sue *A* by entry *sur* intrusion). His action against *A* is not *mortdancestor*, because that does not lie between parties of one stock: Select Civil Pleas, S. S. 3, pl. 139 (1203); *ante*, footnote ⁶³; yet he in fact recovered by *mortdancestor* in Fitz. *Mordaunc*, 54 (1228), and in B. N. B. 1857 (1226—7), and Bracton annotated the latter decision as erroneous.

⁷² If *B* obtains judgment against *A* he is safe, even if *A* subsequently has a child: *aliter* if a child is born to *A* before judgment, for that child would be a nearer heir than *B*: Bract. ff. 277, 279b; B. N. B. 637 (1231). *B* is likewise safe if *A* takes his homage before any such child is born: Fitz. *Avowrye*, 235 (1285). Cf. Select Civil Pleas, S. S. 3, pl. 47 (1200), where *A* tries to evade *C*'s writ *quod capiat homagium* and would prefer to waive his seignory.

child or (failing such) *A*'s surviving brother, has the greater right to hold in demesne; and this in virtue of the maxim 'cannot be lord and heir' which enshrines the homage-bar. Unfortunately, however, this may not be the end of the matter: subsequent deaths in the family (*e.g.*, *A* dies after his child has recovered from him as above) may draw seignory and fee together yet again, and again the maxim will force them apart as before. It seems, indeed, that there was no certain end to this curious process, so long as there remained any collateral heir of *C*, however remote, to displace the lord.⁷³ The homage-bar disappears only when all heirs fail.⁷⁴ And this is not all. The particular illustration which we have examined was by no means the only set of circumstances in which the maxim 'cannot be lord and heir' pushed titles to and fro within the family.⁷⁵ But it shows sufficiently that here was a system which wrought too many complications and so was likely to be displaced as soon as some adequate alternative could be found. It was doomed to die in 1290, with the abolition of subinfeudation, if not before. In fact it probably disappeared much earlier: although Bracton had so much to say about it, the records of contemporary litigation provide relatively few instances of its operation. Bracton was writing in a time of transition. Soon men will begin to evaluate the incidents and appreciate the advantages of the new estate tail. It is known already that homage done by feoffee in tail is no bar if his issue fail:⁷⁶ here, therefore, the cumbersome rules as to lord and heir could not apply. Moreover, as the estate tail was developing, the practice of employing charters with express warranties was developing also. Those who preferred fee simple to fee tail were thus enabled to clothe their donees with an adequate protection without resorting to the homage-bar.

(ii) THE FINE AS A BAR

We have seen already that a conveyance by *fine* carried by implication a warranty which bound the grantor and his heirs, and that the fine operated to *bar* adverse claims.⁷⁷ Evidently, however, the preclusive

⁷³ B. N. B. 774 (1233), shows the plea 'cannot be lord and heir' raised by *B*'s great-grandson against *A*'s grandson. Fitz. *Droyt*, 62 (1234), between *A*'s grandson and *B*'s grandson was probably a case of 'lord and heir' but does not specifically report that it was such.

⁷⁴ Glanv. Bk. 7, c. 1; Bract. f. 66; Fleta, Bk. 3, c. 12, § 3.

⁷⁵ It applied also, *e.g.*, where eldest brother enfeoffed a younger brother: Glanv. Bk. 7, c. 1; Bract. f. 24. It would operate to preclude eldest son in favour of a daughter, failing younger sons or their issue: Bract. f. 66b; B. N. B. 774 (1233). But it did not apply to land given in *maritagium* (whether *liberum* or not) so as to repel the donor's heir from his reversion: B. N. B. 61 (1219), and Bracton's annotation thereto. Nor did it apply to any gift for fealty and service without homage: Bract. f. 279; Fitz. *Eschete*, 13 (1318 ?). The most striking case of all was where father enfeoffed eldest son for homage and died whereupon this son inherited the homage; immediately, the title to the land (as opposed to the homage) shifted to the second son because (i) eldest cannot be heir and lord of this land he had acquired by purchase, (ii) *homagium expellit perquisitum*: Bract. f. 65b; Fleta, Bk. 6, c. 1, § 15.

⁷⁶ Bract. f. 279. Evidently Fleta, Bk. 3, c. 12, § 3, made an unintended slip when he gave as his illustration of 'lord and heir' a feoffment to one's younger son or brother 'and the heirs of his body.'

⁷⁷ *Ante*, vol. 8, p. 280.

effect of a fine cannot justly be attributed simply to its implied warranty, for the fine (we are told) is so high a bar that it concludeth, besides the parties and their heirs, 'all persons of the world being of full age . . . if they put not their claim . . . within the year and day.'⁷⁸ It is convenient to mention the fine at this stage because throughout our period, its preclusive effect is already well developed and notorious⁷⁹ and impinges from time to time upon the problems with which this essay is concerned. In particular there are indications that fines are not proving very helpful to the husband desirous of conveying away his wife's property⁸⁰ or of overreaching her prospective claim to dower out of his own.⁸¹

The husband who conveyed by fine his wife's inheritance or *maritagium* thereby barred her *cui in vita* (and presumably her heir), provided always that she was a party to the fine. But this did not go as far as some husbands would wish; for the court in which such a fine was levied would take special care, by separately examining her, to ensure that she was not acting under his coercion.⁸² The fact, however, that fines are being used to convey a wife's *maritagium*—the incipient estate tail—has a certain interest when one remembers that the Statute *De Donis Conditionalibus* will put a stop to this, in the interests of issue and reversioner, before the century is over.⁸³ The statute was not retrospective in its operation. But it was particularly emphatic that no 'second husband of any such woman' (it is evidently alluding to the *maritagium* of her first marriage) shall have anything therein after her death. And Bracton's Note Book has a case wherein a widow, having found herself a second husband, attempts by levying a fine to do for him precisely what the statute will prohibit some fifty years later.⁸⁴

⁷⁸ *Modus Levandi Fines* (Statute of uncertain date: 1289?). Herein it resembled judgments in writ of right: Bract. f. 435b; and *semble*, judgments in *formedon*: Fitz. Taile, 24. As to how one should enter one's claim, etc., see Bract. ff. 435b—437.

⁷⁹ E.g., *Judicium Essoniorum* (1267—1275), Law Tracts, p. 138, includes fines made by chirograph among the 'exceptions' that will destroy the whole cause, and adds '*satis est notorium*.' A conveyance by fine bars the grantor's heir even from alleging that the grantee and his heirs never obtained seisin thereby: *Statutum de Finibus Levatis*, 27 Ed. I (1299), c. 1 (stating that this was the ancient law, but cf. Bract. f. 270, § 4); Britton, Bk. 4, c. 4, § 2. It bars grantor's heir even if grantor had no seisin and even though it contain no express warranty: Y. B. 21 Ed. I (1293), R. S. pp. 58—60, *per* Bereford J.

⁸⁰ But the homage-bar could be used effectively for this purpose (*ante*, pp. 90—91), so also could bar by express warranty (*post*, p. 104).

⁸¹ Unless the dower was *nominata* (specific dower) the problem hardly arose, for so long as his heir can provide her with *escambium* his feoffee will be safe. But dower *nominata* she could recover *in specie* against the feoffee and this, it seems, even where husband had conveyed by fine: B. N. B. (1222), pl. 156 (heir warrants feoffee and at first seeks to plead the fine in bar, but later admits her right to dower). *Aliter*, it would seem, if the wife was a party to the fine: B. N. B. 1459 (1220); or where it was levied by a stranger: B. N. B. 1011 (1224).

⁸² Bract. f. 321b; see also *Modus Levandi Fines* (1289?).

⁸³ Stat. West. II, 13 Ed. I (1285), c. 1: every such fine to be levied *hereafter* shall be null in law, so that issue and reversioner (though of full age, within the realm and out of prison) shall have no need to put their claim. The statutes extended specifically to gifts in *liberum maritagium*.

⁸⁴ B. N. B. 566 (1231). Her father had settled *maritagium* on her and the issue of her first marriage. Her first husband had then died *leaving issue* of that marriage. She then re-married and, with her second husband, levied a fine which reserved life interests to herself and to him with remainder to the reversioner in fee. Then she died, leaving

(iii) IMPLIED WARRANTY AND BAR

We have seen that there were other cases, besides homage and fine, in which a grantor and perhaps his heir after him was bound by law to warrant his grant, even though he has never expressly undertaken to warrant it.⁸⁵ In such cases it followed naturally that he was barred from suing his grantee in derogation of the grant: 'he who is bound to defend his tenant against others ought not himself to aggrieve him contrary to his charter.'⁸⁶ Bar by implied warranty has a special, if transitory, interest in that it helped to bridge the period when the homage-bar was declining and express warranties were not yet universal. Unfortunately, however, any attempt to investigate the matter reveals a practical difficulty. One can never be quite certain, when a plaintiff is held to be barred by his or his ancestor's grant, that there was not in fact an *express* warranty. That the record says nothing of any express warranty is a very strong indication that there was none, but is not necessarily conclusive. One further preliminary point merits attention. Although the plea-rolls and text-books of the period may say somewhere that a particular grant implies a warranty and elsewhere that it operates as a bar, there is seldom any hint that men regarded the bar as arising from the warranty.⁸⁷ Although bar is a natural consequence of warranty, it seems clear that, when bar and warranty arose by implication, each was conceived as arising independently from the grant. That thirteenth century lawyers did not think of bar as a mere derivative of warranty implies that there was room for cases in which a transaction can be pleaded in bar, although it raises no warranty upon which one could vouch. We have seen one instance of this apparent anomaly in connection with the homage-bar.⁸⁸ We shall shortly see others.

Bracton was clearly of opinion that one who enfeoffs another thereby bars himself and his heirs.⁸⁹ He seldom refers to the matter except when listing the 'exceptions' that may be raised against various writs or forms of action. In one significant passage, however, he seems to argue that 'whatever others may say' the feoffor's heir is bound to warrant

no issue of this second marriage. Now the heir of her first marriage comes of age and ejects the second husband. But the latter recovers seisin from him by judgment on the grounds that (i) she 'was able to make a fine and to give and sell her inheritance (*sic*)'; (ii) the fine holds 'until it be annulled according to the law of the land.' This will depend, presumably, upon whether the heir is now too late to enter his claim.

⁸⁵ *Ante*, vol. 8, pp. 280—284.

⁸⁶ Bract. ff. 399—399b.

⁸⁷ There is a clear hint in chapter 8 of *Judicium Essoniorum*, Law Tracts, pp. 136 *et seq.* The chapter is entitled 'What answers and exceptions destroy the writ or the process on the writ,' and it proceeds forthwith to an account of who is bound by warranties express or implied. Other probable hints of it are Bract. ff. 17b, 322b; also Fleta, Bk. 5. c. 5, § 52 (but this perhaps refers to *express* warranties).

⁸⁸ *I.e.*, the fact that homage could bar even when not 'ancestral,' *ante*, p. 88.

⁸⁹ Bract. ff. 17b (feoffment by tenant in tail or *maritagium* bars his heirs but not reversioner), 31b (gift of reversion, with attornment of life-tenant, bars donor and his heirs against donee and his heirs), 270b (heir of feoffor is barred in *mortdancestor*), 320b (plaintiff's charter bars his writ of entry), 322b, § 2 (feoffor's heir is bound to warrant his gift and so is barred). See also *Modus Componendi Brevia*, Law Tracts, pp. 146, 149 (donor is barred by his gift in fee).

his father's gift and so ought to be barred *even though no assets have descended to him*.⁹⁰ When no assets have descended to him, an heir is not liable to provide *escambium* if the land be lost to another;⁹¹ yet he is barred, irrespective of assets, from suing his father's feoffee for the land. The case law of the period provides numerous examples of feoffors⁹² or their heirs⁹³ suing to recover land from defendants who plead in bar some gift or feoffment and thereby prevail. But it is noteworthy that a defendant who pleads in bar seems usually to be the actual feoffee and seems always to have the feoffor's charter. It would appear to follow that the implied warranty-bar (like the word *dedi* in a subinfeudation)⁹⁴ bound the feoffor and his heirs also, but did not operate unless the feoffment was evidenced by a charter. Towards the end of the century there is a case in which a tenant in tail or *in maritagium*, who had alienated the entailed land before *De Donis*, was evidently thought to have barred her issue;⁹⁵ and another wherein a gift in tail was held to bar the donor's heir from suing the donee's son.⁹⁶ There is also a complicated decision which shows that the warranty implied in an exchange of land carried a bar with it.⁹⁷ But, perhaps, the most skilful and precocious of all the century's endeavours to prostitute the warranty-bar was that of Osbert de Gladefen. In defiance of the well-established rules that father cannot inherit and that one cannot be lord and heir, he managed to convey his dead son's land to a certain priory; and the Justices of Assize who adjudged his conveyance ineffectual were reversed by writ of error and amerced for a false judgment.⁹⁸

⁹⁰ Bract. ff. 322—322b. This is a very involved and obscure passage about husband alienating wife's inheritance or *maritagium*. If its true meaning is as stated in the text, we have here the reason for the Statute of Gloucester, 1278, c. 3 (*post*, p. 104), which enacted that henceforth alienation of tenant by the curtesy does not bar heir unless assets descend. In B. N. B. 1683 (1225), a father shielded his son from his warranties by conveying all his remaining land to X to the use of the son, so that X might reconvey to the son in *maritagium* with X's daughter.

⁹¹ *Ante*, vol. 8, pp. 293—294.

⁹² *E.g.*, Eyre Rolls, S. S. 53 (1219), pl. 371 (vendor fails in *novel disseisin* against purchaser who, a month later, obtains a judgment that vendor is bound to warrant him, *ibid.* pl. 666); B. N. B. (1233), pl. 750 (in *quo warranto*, brought ostensibly by the King, defendant produces King's charter of gift and prays that the king warrant him); B. N. B. (1224), pl. 1000 (*de warrantia cartae* brought by donee against donors who are evidently suing him elsewhere by assize).

⁹³ *E.g.*, Select Cases in King's Bench, S. S. 55 (1274), pl. 3 (donor's heir alleges against donee that he had disseised donor before the charter of alleged feoffment); B. N. B. (1224), pl. 979 (*de warrantia cartae* brought by donee against donor's heir who is suing him elsewhere by writ of right); B. N. B. (1223), pl. 1648 (same); Eyre Rolls, S. S. 56 (1218—19), pl. 1127 (donor's heir brings *cui in vita* against donee who answers that plaintiff ought to warrant him; plaintiff replies that his mother made the charter on her death-bed while under her husband's rod); B. N. B. (1225), pl. 1685 (donor's heir claims advowson against donee who ultimately admits that he was never seized by presenting); Select Civil Pleas, S. S. 3 (1200), pleas 41, 134 (donor's heir claims advowson against donee).

⁹⁴ *Ante*, vol. 8, p. 281.

⁹⁵ Y. B. 22 Ed. I (1294), R. S., pp. 565—568: the heir of her body now sues *formedon* in the descender against her feoffee's heir.

⁹⁶ Fitz. Droyt, 41 (temp. Ed. I): such a deed of gift, whether in tail or for life or for years, bars plaintiff's action though not his ultimate right in reversion—*per* Metingham J.

⁹⁷ Fitz. Dower, 204 (1303). See also *ante*, vol. 8, pp. 282—283.

⁹⁸ B. N. B. 564 (1231). Osbert had himself enfeoffed this son for homage. This son then died without issue. Then Osbert enfeoffed the Prior, whereupon Osbert's eldest son brought *mortdancester* (as deceased son's heir) against the Prior. The Prior vouched

So far, we have not considered the quitclaim, release or confirmation made by one who had right to one who had possession under a dubious title.⁹⁹ The time was to come when charters of quitclaim, incorporating an *express* warranty, would be used extensively as a device whereby to bar one's heirs from challenging a wrongful seisin. In the thirteenth century, however, we can only trace the beginnings of the matter. Bracton knows that a defective gift becomes invincible if confirmed by him who would otherwise be able to invalidate it;¹⁰⁰ but no confirmation is effective, as yet, unless he who makes it has already right in the land nor unless he to whom it is made is in seisin thereof.¹⁰¹ Britton says the same, and adds that release or quitclaim by word of mouth does not suffice: to be pleaded in bar it must be evidenced 'by record of our court or by writing or charter.'¹⁰² Here then we have the charter of quitclaim as a bar to him who makes it and (if it mentions them) to his heirs after him:¹⁰³ and yet no warranty was implied in charters of quitclaim as such.¹⁰⁴ The case-law of the period provides a fair number of illustrations.¹⁰⁵ In one of them, dated 1294,¹⁰⁶ a tenant in tail had evidently conveyed the entailed land to a stranger, who thereupon had wisely procured a 'release and quitclaim' from the then reversioner

Osbert to warranty, whereupon Osbert at once took to religion (and so was civilly dead) so that the burden of his implied warranty descended at once upon the plaintiff (as his heir) and barred his action. Next, a younger son of Osbert brought *mortdancestor* against the Prior and obtained judgment by pleading that eldest son cannot be lord and heir. That judgment is now reversed by writ of error (see *ante*, p. 97, footnote 69). Cf. B. N. B. 949 (1224).

⁹⁹ *Ante*, vol. 8, p. 276, note 20.
¹⁰⁰ Bract. f. 24. A common case is the gift, without livery of seisin in donor's lifetime, perfected by confirmation from donor's heir after his death: Bract. ff. 27b—28 (death-bed gift to a religious house), 58; *Modus Componendi Brevia*, Law Tracts, pp. 146, 149. Another is confirmation or quitclaim by widow whose late husband had purported to convey her *maritagium* or inheritance: Bract. f. 321b. The reversioner who confirms a gift in fee made by life-tenant (f. 31) or tenant in tail (f. 66b) is barred from disputing its validity. Lord who confirms his tenant's subinfeudation (*e.g.*, Select Civil Pleas, S. S. 3, 1200, pleas 45, 66) is barred from the demesne if tenant's heirs fail: Bract. f. 66b. See also *ibid.* ff. 58—58b, 64—67 (true owner confirms gift made by another); Britton, Bk. 2, c. 3, § 10 (same).

¹⁰¹ Bract. ff. 58b—59b. Hence, confirmation from heir-apparent is null; and confirmations are unlikely to assist donee of an advowson who has never yet presented (*e.g.*, Select Civil Pleas, S. S. 3, 1200—1202, Nos. 41, 134, 248; B. N. B. 1222, pl. 199). See also Mirror of Justices, S. S. 7, p. 74; Britton, Bk. 2, c. 8, § 9 (charters of quitclaim and confirmation should therefore be dated); *ibid.* Bk. 3, c. 22, § 4; Fitz. *Confirmation*, 19 (1285).

¹⁰² Britton, Bk. 3, c. 22, § 4; compare Bract. f. 270b, § 1 (can be proved by charter or *assize*). Quitclaims in court seem in practice to have been incorporated in charters: they are not always easy to distinguish from fines: see footnotes 103, 107, *infra*.

¹⁰³ *E.g.*, Select Civil Pleas, S. S. 3 (1201), pl. 26 (*A*'s quitclaim by charter to *B* in lord's court bars *A*'s heir from suing *B*'s heir); B. N. B. (1225), pl. 1054 (same in King's court because charter quitclaimed for *A* 'and his heirs'); Select Cases in King's Bench, S. S. 55 (1274), pl. 3 (same, for himself and his heirs to disseisor and his heirs); Y. B. 20 Ed. I (1292), R. S., pp. 298—300 (same, to *B* and his heirs and assigns, but not stated to have occurred in court). That the heirs were barred is implied also in Bract. f. 270b, § 1, and in the Statute of Wales, 1284, c. 8 (one may plead in bar a charter of quitclaim from anyone in the descent).

¹⁰⁴ Charter of confirmation implies a warranty only if it purports to *give* as well as to confirm: Bract. ff. 388b—399. Most early charters of gift used the formula 'I have given and hereby confirm; for they were evidencing a previous feoffment.'

¹⁰⁵ See *e.g.*, footnote 103, *ante*.

¹⁰⁶ Y. B. 22 Ed. I (Eyre, 1294), R. S., pp. 316—320.

(heir of original donor). Now that reversioner is dead, and he who stands in his place is suing the stranger by writ of *formedon in the reverter*. The stranger proffers the deed of quitclaim and pleads it in bar. The plaintiff, seeking to evade the bar, alleges that he who made the deed was under age when he made it. This provokes the rejoinder (in substance a vouching of the court rolls) that he must have been of age because, some years before, he had acknowledged and enrolled a deed in court. The judge exposes this argument as a fallacy, by showing how casually the courts accept enrolments.¹⁰⁷ Finally, however, the inquest comes and says that the quitclaim was made when the maker of it was twenty-two years old. Accordingly, the action fails.

(iv) EXPRESS WARRANTY AS A BAR

We now approach the final stage in the development of the warranty-bar. Hitherto, we have seen the bar either associated with an implied warranty or, occasionally, standing alone. Unlike the bar, implied warranty never stood alone: one who was bound to warranty was necessarily barred also. It was natural enough that, as men realised the advantages of embodying their conveyances in deeds and charters, conveyancers would begin to see the advantage of *express* warranty as a bar. The manner in which Bracton wrote of express warranties and bars suggests that this stage was not reached in his time.¹⁰⁸ Towards the end of the century, however, Fleta takes Bracton's very words and, by some slight adjustments, makes them say dogmatically that express warranty is itself a bar.¹⁰⁹ And Britton, writing a few years later, makes it more obvious still.¹¹⁰ The case-law of the century tells a similar story. Few, if any, express warranties were pleaded in bar

¹⁰⁷ *Per* Cave J.: All one has to do is say 'Yes, Sir' when asked 'Do you wish this charter to be enrolled?' It is not like levying a fine, where the court examined one's condition. 'And this enrolling is only useful for fear that the deed may be denied or destroyed.'

¹⁰⁸ Bract. f. 37b: Does an express warranty 'against all persons' bind donor and his heirs to warrant against themselves? No: 'all persons' must be construed as excluding them, because if they claim the land in demesne their action is evaded *by the exception of the donation* (he does not say 'of the warranty'), since those cannot claim who ought to warrant against others. I have noted only one passage which may indicate that Bracton attached any importance to express warranty as a bar: at f. 394b, he lists 'donation or sale with express warranty or for homage' among those exceptions which may avail to a warrantor though not available to defendant (hence the desirability of vouching a warrantor if one can). I have not noted any case of an obviously express warranty pleaded in bar in Bracton's Note Book; compare B. N. B. (1231), 633 (husband and wife conveyed with express warranty and she subsequently sued successfully for dower—married woman's deed does not bind her).

¹⁰⁹ Fleta, Bk. 3, c. 14, § 11: by saying in the warranty 'against all men' he excludes himself and his heirs, so that they cannot claim in demesne that which they are bound to warrant against others (contrast Bract. f. 37b, see preceding footnote). See also Fleta, Bk. 3, c. 14, § 6: if an express warranty extends to donee and his heirs and assigns, and the donee does assign, the donor's heirs 'are bound to warrant the gift more strongly than to revoke it.'

¹¹⁰ Britton, Bk. 3, c. 22, § 5: defendant may plead by way of exception that plaintiff's ancestor 'enfeoffed him and bound plaintiff to warranty and therefore if he were impleaded by another he should vouch him to warranty.' Here, be it noted, there is no longer any reliance upon the phrase 'against all men'; cf. notes ¹⁰⁸, ¹⁰⁹, *supra*.

during the period covered by Bracton's Note Book. The indications are that the flow did not begin until the turn of the century. And even in the latter half of the century there is not much recorded litigation on the subject. What little there is, however, is mainly addressed to two problems. First, does this new bar enable a husband to convey his wife's fee, to the disherison of her heirs? Second, does it enable tenant in tail to convey the fee so as to oust issue in tail and reversioner? These two early problems of the over-reaching conveyance merit separate treatment.

We have seen already that a judicious use of the bar implied from homage or charter would sometimes enable a husband to convey his wife's land to the disherison of their common heirs, and, further, that this bar would fall upon the heirs whether or no they inherited with it any of his assets.¹¹¹ This was changed, in 1278, by the Statute of Gloucester.¹¹² Henceforth a husband's alienations of his wife's inheritance or *maritagium* whether he so alienates in her lifetime or after her death whilst he holds by the curtesy, will *not* bar the heirs except in so far as they inherit other lands from him. The Statute did not apply to conveyances by fine; but it applied elsewhere, even when the husband's deed of conveyance contained an express warranty for himself and his heirs.¹¹² Perhaps the earliest recorded case of a tenant by the curtesy who has alienated with express warranty is one dated 1263: and the court evidently considered that, irrespective of assets by descent, the common heir was barred.¹¹³ The remaining decisions occurred after the Statute, and the Statute is their chief concern: it is not retrospective in its operation;¹¹⁴ it is not applicable where a wife alienates with express warranty the lands of her deceased husband which she holds in dower.¹¹⁵ One of them is especially significant; for it shows that men are now beginning to include express warranties in charters of release and quitclaim.¹¹⁶

As regards alienations with express warranty by *tenants in tail*, there are no signs in the latter half of the century that men are hoping thereby to bar the donor's reversion.¹¹⁷ The issue in tail are different. They may be vouched on such a warranty and may even be sued thereon by writ *de warrantia cartae*.¹¹⁸ Does it also bar them from their writ of *formedon*? In 1272, the son of tenant in tail sued *formedon* against his

¹¹¹ *Ante*, pp. 91 (homage), 101, notes ⁹⁰, ⁹³ (charter). Lack of assets by descent had long excused an heir from making *escambium* for his father's warranty, though not from his duty to warrant if vouched: *ante*, vol. 8, p. 293.

¹¹² Stat. 6 Ed. I, c. 3.

¹¹³ Fitz. *Ayde*, 175 (1263): grantor is still alive and is vouched by grantee; grantee prays aid of heir; aid refused because heir has no interest in the outcome of the action.

¹¹⁴ Fitz. *Garrantie*, 87 (temp. E. 1); *ibid.* 95, (1303).

¹¹⁵ Fitz. *Garrantie*, 86 (temp. E. 1). But another chapter of the statute (c. 7) improved the heir's position in such a case by giving him an *immediate* writ of entry (so that he can sue before her warranty descends upon him); see also *Modus Componendi Brevia*, Law Tracts, pp. 149—150.

¹¹⁶ Fitz. *Garrantie*, 87 (temp. E. 1).

¹¹⁷ Even donor's own express warranty ceases to bar him and his heirs if the gift fails for breach of condition: Fitz. *Feffements & Fails* (1284), No. 114 (Joan gives with express warranty to William *causa matrimonii prelocuti*: she can recover the land from him if he fails to marry her).

¹¹⁸ Fitz. *Garrantie*, 89 (temp. E. 1); *Garrantie de Charters*, 32, s.c.

father's feoffee, who thereupon purported to vouch him to warranty—why he did not plead outright in bar is a mystery. The son naturally objected that 'it is not in due course of law to vouch the demandant'; and the voucher was disallowed. Then follows a note in latin in which the scribe gives his own opinion that the father's alienation does not bar his heir in tail because it is *contra formam doni*, unless (be it noted) assets have descended to him from the father.¹¹⁹ The scribe evidently considered that an alienation with warranty by tenant in tail is *not* inconsistent with the donor's presumed intentions, as shown by the form of the gift, so long as the heir in tail inherits from him an adequate compensation. This was a significant line of reasoning, for it implied that there was here a device for barring issue in tail (by express warranty with assets descending) which was not *contra formam doni* and which might therefore be destined to outlive the statute *De Donis*, 1285.¹²⁰ If it seemed obvious to lawyers, before *De Donis*, that 'assets descending' operate to absolve a tenant in tail's alienation from the mischief which the old writ of *formedon* was designed to remedy, it will seem equally obvious, after *De Donis*, that 'assets descending' absolve his alienation from the mischief of the statute: for, so far as the issue are concerned, these mischiefs are identical and are remedied by the identical writ. So it came to pass that express warranties, with assets descending, still stood serenely as a bar to issue in tail at the close of the century.¹²¹ But the fact that this curious loophole in *De Donis* was concerned, as was the Statute of Gloucester, with assets descending, will lead men to see in it the influence of that statute.¹²²

APPENDIX OF ADDITIONS AND CORRECTIONS TO §§ 1—7

(ante, vol. 8, pp. 274—299).

I.—ADDITIONAL POINTS.

- p. 279, n. 48: The reason why a tenant who has been compulsorily attorned in the King's Court to his lord's assignee seems to have been able to vouch that assignee is probably that the court would not compel him to attorn unless the assignee gave him an express warranty by charter. See Bract. f. 82b; Fitz. *Voucher*, 240 (1306).

¹¹⁹ Y. B. 20 Ed. I (1272), R. S., pp. 302—304. Professor Plucknett, *Concise History of the Common Law*, 3rd ed., p. 552, n. 1, appears to regard this as a judicial decision upon the construction of the Statute of Gloucester. A second negative seems to be needed in line 14 of p. 552, *op. cit.*

¹²⁰ 13 Ed. I, Stat. West. II, c. 1. The statute clearly enacts that no tenant in tail shall have power, henceforth, to alienate the entailed land away from his issue, even by a fine. See Y. B. 30 Ed. I (1292), R. S., pp. 300—302, for the scribe's note that a confirmation is lower than a fine, and that therefore an attorney was wrong who contended that, if husband alienated wife's *maritagium* before *De Donis* and she subsequently confirms his alienation in her widowhood after *De Donis*, the issue are barred irrespective of assets by descent.

¹²¹ Fitz. *Garrantie*, 88 (1306): heir in tail held to be barred, even without assets by descent, on the ground that his father had in fact enfeoffed him of an adequate compensation, which would otherwise have descended to him, and had done this in fraud of the law.

¹²² Holdsworth, 3 H. E. L. 117, n. 7; Elphinstone, 6 L. Q. R. 285—286; 2 Blackst. Comm. 302—303. The only obvious point of contact between the two statutes was husband attempting to alienate his wife's *maritagium*. The notion of 'assets by descent' (as a pre-requisite of *escambium* from the heir) was much older than either statute: *ante*, vol. 8, p. 293.

- p. 289, n. ¹¹⁰: In the reign of Edward I a limit was imposed whereby defendant in writ of right can no longer vouch anyone who, or whose ancestor, had not been seised subsequently to the seisin upon which the plaintiff founds his case: Fitz. *Counterple de Vouch*, 118 (1285).
- p. 291, n. ¹³⁰: If one's warrantor has no potential *escambium* it is best not to vouch him: *post*, p. 298; Fitz. *Droyt*, 51 (1285).
- p. 293, n. ¹⁴⁶: A defendant who alienated after notice of the writ was punishable for deceit: Bract. f. 432b, § 4.
- p. 296, lines 9—10: These decisions that the assignee of the burdened land is to be brought before the court may imply that, although he is not bound *de jure*, the court has a discretion to order recourse against him if the assignor or his heir cannot satisfy the warranty. Bracton had such a rule for land burdened by a condition that donee give donor so much or supply him with necessities (f. 18b). It was likewise 'by counsel of the court' that one could sue an heir upon an obligation (*e.g.*, to pay money) made by his ancestor in court for himself and his heirs: Bract. f. 422, § 2.
- p. 297, n. ¹⁶⁴: In Fitz. *Voucher*, 292 (1304), it seems that grantor purported to bind specific land to warranty and afterwards *enfeoffed* his heir of the bound land: the heir is now vouched and pleads 'nothing by descent': Hengham C.J. seems to say that he need not warrant.
- p. 298, n. ¹⁶⁸: Apparently the original object of mentioning 'assigns' in a clause of warranty was simply to provide the feoffee's feoffee with a direct warranty from feoffor and his heirs in case feoffee's heirs fail. Bracton said (f. 17b) that the word did not enable feoffee's feoffee to vouch original feoffor direct so long as original feoffee and his heirs endured.

II.—CORRECTIONS.

- p. 279, n. ⁴⁶: the reference to Mirror of Justices should read as follows: See also Mirror of Justices, S. S. 7, p. 176.
- p. 292, § 5: add, to the first sentence: unless the right to claim *escambium* had been negatived by charter, as in Fitz. *Voucher*, 290 (1303).
- p. 298, line 22: for 'was' substitute 'soon became.'

III.—ADDITIONAL AUTHORITIES FOR FOOTNOTES.

- ⁴ Select Pleas in Manorial Courts, S.S. 2, pp. 155—156.
- ⁹ See also Bract. f. 375, § 5.
- ²⁴ Fitz. *Mesne*, 55 (1303).
- ³⁴ Fitz. *Garrantie*, 93 (1285).
- ³⁸ line 3: Fitz. *Mesne*, 73 (1285).
- ⁴² Fitz. *Voucher*, 270 (1263), 271 (1263).
- ⁴⁸ before line 1, B. N. B. 600 (1231); in line 4, Fitz. *Garrantie*, 90 (E. 1); in line 10, Fitz. *Garrantie*, 91 (1285); in line 12, Fitz. *Voucher*, 277 (1225).
- ⁶¹ Fitz. *Voucher*, 290 (1304), *per* Hengham C.J.
- ⁶² Fitz. *Garrantie*, 92 (1285).
- ⁹² See further, vol. 9, pp. 102, 104, *post*.
- ¹⁰⁰ Fitz. *Voucher*, 281 (1234), 288 (1303).
- ¹⁰¹ See also Bract. f. 433, §§ 5, 6; B. N. B. 1685 (1225).
- ¹⁰⁵ in line 2, Fitz. *Voucher*, 286 (1304).
- ¹⁰⁹ in line 4, Fitz. *Ayde*, 184 (1306); in line 7, Fitz. *Voucher*, 302 (E. 1).
- ¹⁸ See also Fitz. *Voucher*, 272 (1305), 300 (1311).

THE CENTRAL OFFICE OF THE SUPREME COURT

W. VALENTINE BALL

I. PRELIMINARY

IT is not always appreciated that before a case is ready for trial, a vast amount of preliminary work has to be carried out. The playgoer who sits before the footlights, sees the actors, and hears them say their parts. He is but dimly conscious of all that has gone before—the playwright toiling at his manuscript, the rehearsals, and the labours of the dresser and the stage carpenter. So a visitor to the Law Courts who sees a judge on the bench provided with all the documents relating to the action, who watches counsel untie the red tape on his brief, and the solicitor produce documents from a dispatch case, is not always alive to the fact that all this has involved a deal of preparation, not only in the office of the solicitor and the chambers of learned counsel, but in the offices of the Supreme Court.

The judge will have before him a copy of the Record which consists of the Writ and the pleadings in the action. He may also have affidavits, copies of evidence taken on commission, and bundles of correspondence and other documents for consideration during the hearing of the cause. In the preparation of many of these documents the officers of the Supreme Court, united in what is called the 'Central Office' have taken some part. Some of them, too, have been concerned with preparing the cause list and assigning the cause to its proper place in that list.

Until some years before the erection of that stately building which now fills the space between the Temple and Lincoln's Inn, the offices of the Court were scattered about in various places not far from the existing Royal Courts of Justice. Those who remember the *Pickwick Papers* will recall that after Mr. Perker had declared that 'We must have a *habeas corpus*. There'll be no judge at Chambers till four o'clock this afternoon,' he took Mr. Pickwick to Serjeants Inn. Some of the 'offices of the Court' were then in that Inn—an ancient 'Inn of Court' which used to be in Chancery Lane. It was pulled down long since. There were other 'offices' close by. The Masters of the Queen's Bench occupied with their staff rooms somewhere in the Temple. Now they are all collected together in the Central Office.

It would scarcely be an exaggeration to say that the Central Office is closely concerned with all 'interlocutory proceedings'—a phrase which includes everything preliminary to a trial in Court. The office has to do with much else, but these proceedings are its main concern. And they are of great importance! The number of cases which reach trial in open court is but small when compared with the number of actions settled,

withdrawn or otherwise disposed of, as a result of what takes place in this Office.

It came into being as the result of an Act of Parliament passed in 1879, the Supreme Court of Judicature (Officers) Act, now repealed, sect. 4 of which provided that 'There shall be established a Central Office of the Supreme Court of Judicature.' Another section of the same Act provided that a number of offices then existing should be concentrated in and amalgamated with the Central Office. (See Jud. (Cons.) Act, 1925, ss. 104—106.)

A Rule of Court based on that Statute (O. 60A) was added to the then existing Rules of the Supreme Court of 1875 dividing, for the convenient despatch of business, the Central Office into ten Departments, viz. (1) Writ Office and Judgment; (2) Summons and Order; (3) Filing and Record; (4) Taxing; (5) Enrolment; (6) Judgments and Married Women's Acknowledgments; (7) Bills of Sale; (8) Queen's Remembrancer; (9) Crown Office; (10) Associates.

It should be noted that the Central Office was established before the opening of the Royal Courts of Justice in 1882.

The present O. 61 (as amended) takes the place of the old O. 60A. Under O. 61 the Central Office shall be divided into such departments and sub-departments as the Lord Chancellor shall from time to time direct, etc. The alteration authorizing the Lord Chancellor to divide the Central Office into departments took place in 1922. The Central Office is now divided into the departments hereinafter mentioned. (Apart from O. 61, see as to the Central Office—the Judicature (Consolidation) Act, 1925, ss. 104—106.)

In addition to the five departments herein dealt with, the Taxing Office forms part of the Central Office (R. S. C. 1902, r. 1), but is under the control of the Masters of the Supreme Court (Taxing Office) and is now known as the Supreme Court Taxing Office (O. 71, r. 1). The Criminal Appeal Office (for the purposes of clerical staff) forms part of the Central Office (J. A. 1925, s. 104 (1)), and is under the control of the Master of the Crown Office, who is also Registrar of the Court of Criminal Appeal. The Scrivenery Department is under the control of the Senior Master.

First as to the control of the Central Office. It is the special duty of one of the Masters of the King's Bench to be present at, and to control the business of the office (this duty is based on sect. 104 (2) of the Judicature Act of 1925), and to give the necessary directions with respect to questions of practice and procedure relating to the business. (O. 61, r. 2.) While therefore, all the Masters of the Supreme Court (King's Bench Division) are in control, they all take it in turn to sit as 'Practice Master.' The Practice Master is in attendance on every day throughout the year save on Bank Holidays and days when the Courts are closed by rule or by Statute. To him every officer in the building who is in any difficulty can have immediate access. But this is not all: anyone, whether he be counsel, solicitor, solicitor's clerk or a member of the

public, is free to consult the Practice Master at any time. Indeed, the litigant or would-be litigant who is found wandering about the Law Courts, not knowing where to go or what to do, is often sent to the Practice Master for advice and assistance. The variety and complexity of the questions he may have to answer is amazing. On one occasion an unfortunate Practice Master had to solve this conundrum: 'Can a writ be served on Sunday in Baluchistan?' It is desirable to emphasize this because the existence of the Practice Master, and the fact that he is ready to place his knowledge and experience at the disposal of the public is not generally known. But he is only willing to give advice on matters of practice and procedure. He is not to pronounce on substantive law or advise a party as to whether he has a good cause of action.

Suitable candidates for appointment to the Staff are chosen by a Committee of Selection, of which the Lord Chancellor's Secretary and the Senior Master are always members. Recommendations for promotion from one grade to another are made by the Senior Master. Clerks are appointed at an early age, and are distributed amongst the various departments. The Senior Master is responsible to the Lord Chancellor for the discipline and supervision of all the clerks in the Central Office. He may transfer a clerk from one department to another. As all clerks are interchangeable, care is taken to ensure that every clerk shall have an all round experience in the course of his career. He thus becomes in course of time duly qualified to fill any one of the senior offices.

II. THE DEPARTMENTS INTO WHICH THE CENTRAL OFFICE IS DIVIDED

- (1) The Masters' Secretary's Department.
- (2) The Action Department.
- (3) The Filing Department.
- (4) The Crown Office and Associates' Department.
- (5) The King's Remembrancer's Department.

(1) THE MASTERS' SECRETARY'S DEPARTMENT

The Masters' Secretary has many important duties to perform. All the *ex parte* applications which are made to the Masters pass through his office. Thus, if it is desired to effect substituted service of a writ, or to obtain a garnishee order *nisi* the necessary affidavit is brought in the first instance to the Masters' Secretary. Then he has to deal with the many letters which reach the Central Office from all parts of the country. Being generally a 'First-Class Clerk' of long experience, he is familiar with practice and procedure, and is able to answer many questions which would otherwise have to be referred to the Practice Master. When amendments to the Rules of Court are under discussion he is always consulted. One of his duties is to arrange for the distribution of the work amongst the Masters. This he does in consultation with the Senior Master.

A considerable volume of work is also transacted in this department in connection with the issue of Letters of Request for the taking of evidence in foreign countries, and the service of documents abroad through the diplomatic channel and Requests from foreign Courts to take evidence or serve documents within the jurisdiction of the English Court. Civil procedure Conventions dealing with the taking of evidence and the service of proceedings have been made with twenty-two foreign countries, and under these Conventions the Senior Master is designated as the person by or to whom Requests are transmitted, and the office of the Masters' Secretary is made use of for the purpose of giving effect thereto.

Among other important matters handled in this department are: correspondence and applications for payment out of monies recovered by an infant (or widow under Lord Campbell's Acts), if retained and invested in the High Court, for purposes such as maintenance, education, clothes, surgical appliances, etc., correspondence dealing with the taxation of costs in such cases; correspondence dealing with accounts of Receivers appointed by way of equitable execution and Judgment Debtors lists.

This department also deals with Parliamentary and Municipal Election Petitions.

(2) THE ACTION DEPARTMENT

This was formed in 1922 by amalgamation of the Writ Appearance and Judgment Department and the Summons and Order Department. These latter now form two sections or sub-departments. For purposes of convenience work is carried on as it was before the amalgamation. It is in charge of a Head Clerk.

(a) *Writ, Appearance and Judgment Section*

- (1) *Writ and Appearance Rooms.*—Here are issued all writs of Summons in King's Bench, Chancery, Probate and Admiralty (exclusive of those issued out of a District Registry), Chancery Originating Summonses, Petitions of Right, Writs of Subpœna and third party notices. It should be noted that Divorce petitions are issued from the Divorce Registry.

The Central Office is not concerned with the nature of an action, and cannot refuse to issue a writ howsoever ridiculous the proposed action may appear to be.

All Appearances entered in London are entered here. The Cause Books (O. 5, r. 13) are kept here and searches for appearance and other searches in the Cause books are made in these rooms.

A defendant generally enters appearance in person or by his solicitor, but he may enter appearance by post, in which case it is the duty of the office to give postal notice of the fact of appearance to the plaintiff. The clerk who receives an appearance has to see that it is in the proper form.

- (2) *Judgment Rooms*.—All King's Bench Judgments in respect of writs issued out of the Central Office are entered and signed here. Writs of Execution are also issued from here.

(b) *Summons and Order Section*

In this section summonses (including originating summonses in the King's Bench Division) before Masters and Judge in Chambers are issued, and orders are checked and sealed.

The orders are not actually drawn up by the clerks of the Department in the sense of being written out by them. They are prepared by the parties or solicitors having the custody of the summons, and are carefully checked by officials of the Department.

A large part of the time of the Action Department is taken up with the issue of King's Bench Summonses and the drawing up of orders made by the Judge or the Master in Chambers. In order to ensure the equal distribution of work among the Masters each case is assigned to one of three divisions of the alphabet A—K, G—N, and O—Z, according to the initial letter of the plaintiff's surname. Thus '*Brown v. Jones*' would be assigned to the A—K list, so that whenever any summons is taken out in the action of *Brown v. Jones* it will inevitably come before the Master who is taking the A—K list.

The issue of summonses goes on all the year round—subject to this, that certain kinds of summons cannot be issued in the Long Vacation (Annual Practice, 1944, p. 1397), save by special leave. One kind of summons which can both be issued and be heard at any time all the year round deserves special mention. This is the Summons for judgment under O. 15. Those who are wont to inveigh against the law's delays are often either unaware of, or have forgotten, this fact. Anyone to whom money is due can bring suit and obtain judgment for it by action in the High Court at any time. And he will obtain judgment in about three weeks time—unless the defendant is able to swear to some kind of defence. One of the most important duties of the Chief Clerk of this section is to attend on the Judge in Chambers when he is taking his lists for the purpose of giving him such assistance as may be required in matters of office practice and procedure.

(3) THE FILING DEPARTMENT

This Department is an amalgamation of the one time Filing and Record, Bills of Sale and Enrolment Departments. It is by no means the least important department of the Central Office. Here are filed all affidavits (King's Bench and Chancery), depositions, King's Bench Chambers orders and such other documents as may be directed by the Masters to

be filed. Of all such documents, affidavits are the most important, for they are sworn evidence upon which the Court has acted. No affidavit can be removed from the Central Office without the order of a judge or a master. All recent affidavits are kept in the building, but those of long ago have been of necessity and for want of room removed to the Record Office. King's Bench Affidavits of Service are destroyed after twelve years, and all other King's Bench Affidavits are destroyed after twenty years. They are not sent to the Record Office.

Chancery Affidavits are sent to the Record Office after about twenty years.

An extraordinarily ingenious system of filing renders it possible for any affidavit filed in any 'cause or matter' to be produced for inspection within a few minutes.

It is in the Filing Department, too, that Bills of Sale are registered. These documents being a charge upon property it is provided by statute that no Bill of Sale shall be valid unless it is registered within a certain time of its execution. Any person anxious to find out whether property is subject to a charge may, on payment of a prescribed fee, cause a search to be made for the record of any Bill of Sale.

Deeds and other documents are from time to time ordered to be deposited in the Central Office for safe custody. They are in charge of the Filing Department. A vast strong room in the crypt of the Law Courts is filled with tin boxes containing various documents deposited by order of court in bygone times—documents which were doubtless of importance in litigation now long forgotten. Even the descendants of those to whom they may have meant much are unknown! Not long since it transpired that one of these deed boxes contained the papers in an action commenced many years ago. Amongst them were a number of letters relating to the captivity of Napoleon in St. Helena. Some antiquary heard of this and sought to make use of them. But even the Master of the Rolls himself could do nothing in the matter because the 'parties' were nowhere to be found, and publication of any of the documents might have been an infringement of copyright.

It is in the Filing Department, too, that deeds poll for 'change of name' (by a British subject) may be enrolled. The word *may* is used advisedly; because no one changing his name by deed poll need have it recorded. But it is not every such deed that will be recorded. Certain requirements must be fulfilled. (See the *Annual Practice*, 1944, p. 1374.)

Other documents enrolled are Deeds under various Acts, Hanaper Rolls (Proclamations, Royal Charters and Warrants, Peerages, Presentations, (Ecclesiastical) and Appointments to King's Counsel). When the Hanaper Rolls are registered and enrolled, the originals and enrolments are in due course transferred to the Record Office.

Any deed may be enrolled for safe custody (*Annual Practice*, 1944, p. 1375).

(4) THE CROWN OFFICE AND ASSOCIATES' DEPARTMENT

When all the preliminary steps have been taken, an action is set down for trial in the Associates' Department. It is the duty of the Clerk of the Lists, subject to the supervision and direction of the Lord Chief Justice, to keep the list of cases for trial. The Judge's Associate—a gentleman who may be seen in Court on any day when a Judge is sitting—is one of the staff of the Central Office. It is for him to call the case; to call over the names of the jurors; to swear the jury; to see that all documents tendered in evidence are properly stamped—if a stamp be necessary; to take the verdict, and record the judgment. Being generally an officer of wide experience he is often able to assist the Judge when some nice point of practice or procedure comes up for decision.

But one must not forget the 'King's Coroner and Attorney and Master of the Crown Office' himself who is the head of this department. To his multifarious duties he adds that of acting as Registrar to the Court of Criminal Appeal. He holds an office of great antiquity. The two offices of 'King's Coroner and Attorney' and 'Master of the Crown Office' were merged into one in the year 1892. A search of the Patent Rolls reveals the names of the holders of the office of 'King's Coroner and Attorney' as far back as 1422.

Apart from its work at *nisi prius*, this department has to deal with Habeas Corpus, Mandamus, Certiorari, Prohibition, Attachment for Contempt, the Summons for Bail, Appeals from Quarter Sessions and Courts of Summary Jurisdiction by case stated, and the setting aside of Arbitrator's Awards.

(5) THE KING'S REMEMBRANCER'S DEPARTMENT

Virtute officii the Senior Master of the Supreme Court (King's Bench Division) holds the office of King's Remembrancer, and performs its duties, which may be divided into litigious and non-litigious.

While the origin of this picturesque office is partially lost in the mists of antiquity, thus much is certain: it was always the duty of the King's Remembrancer to see to the collection of the Revenue. It is therefore appropriate that it is in this department that proceedings to recover debts due to the Crown are usually commenced. Special forms of writ are used. The procedure is not expensive and is more effective than that of the King's Bench in one respect, in that the *capias* may still issue against a person who fails to pay a debt due to the Crown. He may be cast into gaol unless he satisfies the judgment. Among the debts recovered are penalties due in respect of customs, excise or stamps; income tax, death duties.

In 1933 an Act was passed which enables debts due to the Crown to be recovered by ordinary action at law. This was followed by an amendment of the Rules of the Supreme Court (see O. 68, r. 5) by which it was sought to encourage applications for summary judgment in revenue cases.

But the Treasury Solicitor has hitherto refrained from adopting this procedure. And this in mercy to the taxpayer! When a taxpayer has no answer to a claim of the Inland Revenue and is summoned before the King's Remembrancer and ordered to pay what is due, the costs of the proceedings are very trifling. Were he to be sued by ordinary writ, these costs would be nearly ten times as much.

For the rest, the King's Remembrancer in the discharge of his litigious duties files in his office and sets down for hearing all special cases arising out of pending revenue matters, and appeals in those matters to the Court of Appeal. Fines and recognizances *estreated* into the Exchequer from (1) the Central Criminal Court, (2) King's Bench Division (*e.g.*, for contempt of Court), and (3) the House of Lords, are dealt with in his Department. They cannot be dealt with until *estreated*. It should be noted that fines imposed at Quarter Sessions or at Assizes are collected by the Clerk of Quarter Sessions or Clerk of Assize and are never in practice *estreated* for collection in the King's Remembrancer's Department.

When we bear in mind that the King's Remembrancer was concerned from the earliest times with the collection of revenue for the King it is not uninteresting to note that he is still in some respects the greatest of Crown Debt Collectors.

The non-litigious duties of the King's Remembrancer have been well summarized by Sir George Bonner in his '*The Office of the King's Remembrancer in England*' (1930). One of the most interesting of them, the nomination of the sheriffs, is a survival from the time when he had other duties, to be mentioned later, concerning the sheriffs. It is for the King's Remembrancer to prepare the documents in connection with their nomination; to attend in Court at the nomination every November 12th, and to prepare the roll for pricking by His Majesty. He must also prepare warrants signifying His Majesty's approval of election of Sheriffs of the City of London.

Jacobs in his *Law Dictionary* (1772) states that it was the duty of the King's Remembrancer to read the 'oath of all the officers of the Court.' He no longer swears in the officers of the Court, but he must be in attendance when the Lord Chancellor takes the oath of allegiance and office. When Mr. Attorney (as is customary) moves that 'the proceedings be recorded,' it is the duty of the King's Remembrancer to record them.

He also comes into prominence on Lord Mayor's Day, when the Chief Magistrate attends at the Royal Courts of Justice. The necessary warrant is prepared by him and it is for him to read the Declaration to the Lord Mayor, who repeats it after him. On this occasion he wears—for a short time—a three-corned hat on the top of his wig, as who should say: 'I have the right to be covered in your presence!'

The King's Remembrancer must preside at the rendering of certain quit rent services due to the Crown from the Corporation of the City of London in respect of certain lands in Shropshire known as 'the Moors':

no one knows precisely where they are. The date when this quit rent was first exacted is unknown, but according to Sir George Bonner: 'In 1245 one Nicholas de Mora paid this rent service to the Exchequer with two knives "one very good and one very bad."' And the custom survives, a billhook and a hatchet taking the place of the two knives. The City Solicitor cuts two faggots, one with the bill-hook and the other with the hatchet, and hands the implements to the King's Remembrancer, who keeps them as a perquisite.

But the Citizens of London have to pay quit rent for property rather nearer their home. On a day in Martinmas the City Solicitor comes before the King's Remembrancer and calls upon 'Tenants and occupiers of a certain tenement called "the Forge" in the Parish of St. Clement Danes "to come forth and do your service."' He then counts out, aloud, six horseshoes and sixty-one nails, which the King's Remembrancer pronounces to be 'good number.' According to Sir George Bonner, 'a "grant of Forge" was made to Walter Le Brun, farrier in the Strand, he rendering six horseshoes for it . . . The rent was wont to be paid at the Exchequer every year . . .' It is believed that Le Brun was a farrier who repaired the armour and shod the horses of the Knights Templars. At any rate his forge was hardly the site of their tilting ground. According to Madox (who wrote in the eighteenth century): 'This service is still rendered at the Exchequer to this day by the Mayor and Citizens of London, to whom, in process of time the said piece of ground was granted.' The same horseshoes, which are of enormous size, have been used in this ceremony for 500 years! They are preserved in the office of the King's Remembrancer.

Various other duties have devolved upon the Remembrancer in more modern times, of which the most important is the Trial of the Pyx. It is obvious that in any country where there is 'coin of the Realm,' that coin must always be related to a certain standard and ought to be kept up to that standard. For centuries, therefore, it has been the practice to test the coinage once a year. A jury is sworn to pronounce upon the question: 'Is the metal within the remedy as to fineness?' In former days a High Officer of State presided at the trial. Indeed, James I and Charles II presided in person at the trial, and as late as the year 1866 the Lord Chancellor presided. By an Order in Council, dated 1871, the trial now takes place at the Guildhall in the City of London before the King's Remembrancer. He administers an oath to a jury summoned from amongst the members of the Goldsmiths' Company. Coins are taken from the 'pyx,' or 'pixe' which is a box or chest in which officials from the Mint are wont to place the coins. A certain number having been selected, they are melted down, and the ingot thus obtained is weighed and analysed. The metal must be up to certain standard plates which are kept by the Board of Trade. The verdict of the jury is recorded at an adjourned hearing.

III. THE HISTORY OF THE KING'S REMEMBRANCER

It may be of interest to conclude the foregoing outline of the duties of the King's Remembrancer with a few words about his history.

The opinion has been expressed that the first King's Remembrancer, if he did not come over with William the Conqueror, was an officer attached to the court of that Monarch when he ruled in Normandy. 'Remembrancers' (*Rememoratores*) were always officers of the Exchequer and an Exchequer (of a kind) existed in the days of the Conqueror. It was the function of the Remembrancer to see that liege subjects were paying what was due to His Majesty. The Treasury Remembrancer was concerned with the fixed revenue of the Crown, while the King's Remembrancer was alert to see to the collection of the casual revenue.

According to *Jacobs' Law Dictionary* (1772) 'The King's Remembrancer enters in his office all recognizances taken before the Barons (of the Exchequer) for any of the King's debts, and he takes bonds for such debts, and makes out process for breach of them; also he writes process against the Collectors of Customs, Excise, and other public payments for their accounts. All information on penal statutes are entered and sued in his office; and he makes the bills of composition on penal laws, and takes the stallment (*sic*) of debts: and all matters on English bills in the Exchequer-Chamber remain in the office of this Remembrancer . . . In *Crastina animarum* yearly he reads in the court the oath of all the officers of the court, when they are admitted.'

Jacobs also says of the Treasurer's Remembrancer that he 'issues out process of *fieri facias* and extracts for debts to the King; and against Sheriffs, escheators, etc., not accounting, he takes accounts of all Sheriffs . . .'

Mention has been made of some of the duties of the Treasury Remembrancer, because, in process of time his office was abolished and merged in that of the King's Remembrancer. The latter appears to have always been a lawyer, and he was legal adviser to the Barons of the Exchequer, many of whom in the Middle Ages were wholly unacquainted with legal principles and the forms of law. What part did the Remembrancer take in their deliberations? Did he always urge the Barons to collect the taxes, or did he act impartially as between the King and his subjects? Was he ever heard to say: 'Eftsoons, my Lords, to exact this impost were to do that which is authorised by no Statute of this Realm!' The records are silent on the point. Madox, in his 'History of the Exchequer' records that in the days of Edward IV the King's Remembrancer was paid £40 'for himself and clerks,' and down to the end of the eighteenth century he enjoyed certain privileges. Thus he could not be sued elsewhere than in the Exchequer. He was discharged 'of watching and warding and of toll'; he was not called upon to find 'any horse or men or armour' for the service of the King; and (most striking of all) he was discharged 'of impost of certain tuns of wine to be spent in his house every year.'

These privileges, alas ! are now lost to to the Office. He who fills it today cannot be excused *virtute officii* from ' fire watching,' nor, if he were able to procure a ' tun of wine,' could he demand to have it duty free !

The office of Treasurer's Remembrancer was abolished in the reign of William IV. Early in the reign of Victoria the duties of the ' First and Second Secondaries ' were handed over to the Queen's Remembrancer, while in 1859 this officer had an Act of Parliament all to himself. It was there recited that the office might ' conveniently be held by one of the Masters,' and that on any future vacancy occurring the Commissioners might ' appoint one of the Masters of the Exchequer.' Sir Frederick Pollock was so appointed in 1874. In 1879 it was roundly provided by the Judicature Act, s. 14, that ' the Senior Master of the Supreme Court shall hold and perform the office of Queen's Remembrancer, " with such additional salary in respect of that office as the Lord Chancellor with the concurrence of the Treasury may determine." '

NOTES ON RECENT CASES

CONFLICT OF LAWS—JURISDICTION—PETITION TO ANNUL A VOIDABLE MARRIAGE GRANTED TO DOMICILED AMERICAN ON GROUNDS OF RESIDENCE IN ENGLAND.

Hutter v. Hutter. [1944] 2 All E. R. 368.

A soldier, domiciled in the U.S., married in England, a domiciled Englishwoman.

Pilcher J. held, that since the petitioner was resident in England he had jurisdiction to grant a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage.

The distinction between a marriage void '*ab initio*' and one valid till impugned, drawn by Bateson J. in *Inverclyde v. Inverclyde* [1931] P. 29, at p. 41, for the purposes of jurisdiction, was disapproved by the learned judge, who preferred to follow *Easterbrook v. Easterbrook* [1944] P. 10.

Pilcher J. pointed out (at p. 373) that domicile as a test of jurisdiction in cases of dissolution of marriage was not established till 1895 (*Le Mesurier v. Le Mesurier* [1895] A. C. 517, and was not imported, till the *Inverclyde Case*, into nullity suits, which the Ecclesiastical Courts (whose jurisdiction had been transferred to the present Court by the Matrimonial Causes Act, 1857, s. 22, as repealed and replaced by sect. 32 of the Judicature Act, 1925), had always entertained on the ground of residence.

This case appears to follow a recent tendency (not yet, perhaps, a trend to return to the test of residence in suits of this type: see *White v. White* [1937] P. 111, for void marriages, and cf. *May v. May* [1943] 2 All E. R. 147, for divorce.

It is respectfully submitted that the practice of assuming jurisdiction in voidable marriages on the ground of residence, is not desirable and ought not be followed. Such a marriage is valid till questioned, the wife is a true wife till the marriage is dissolved. It must, therefore result in a status, alterable only according to modern theory in the Courts of the domicile if such changes are to win universal recognition. On the other hand, and in spite of Professor Cheshire's dismissal of this contention as academic (2nd edit., at p. 338—39), it is humbly submitted that a void marriage cannot result in a change of status. It is no marriage, even if never pronounced upon by the Court; it is more than an argument '*ad misericordiam*' (see Cheshire, at p. 343), to hold that it is absurd for the 'wife' to be compelled to bring an action in the Courts of the 'husband's' domicile, when she never was, and never will be, his wife: and this without doubting the *dictum* of Hannen P. in *Turner v. Thompson* (1888) 13 P. D. 37, 41.

It is to be hoped that *Easterbrook v. Easterbrook* and *Hutter v. Hutter* are but the outcome of a social problem due largely to the war, and will not become the *fons et origo* of a new departure in the law. It is to be remarked in this connection that both are decisions of puisne judges, and *dicta* in the House of Lords in the *Salvesen Case* [1927] A. C. 641, 654, 671, would appear to favour the view suggested.

E. S.

CONTRACT—DUTY TO MINIMIZE DAMAGES FOR BREACH—PLAINTIFF HELD TO BE UNDER NO DUTY TO EXPEND MONEY TO MINIMIZE LOSS OR TO ACCOUNT FOR MONEY ACCRUING TO HIM IN CONSEQUENCE OF SUCH EXPENDITURE.

Jewelowski v. Propp. [1944] K. B. 510.

A was induced by B's fraudulent misrepresentation to advance £1,000 on a debenture, in respect of which, when the company was wound up, he received £257 16s. 2d. During the process of winding up, the receiver offered for sale certain assets of the company which A, quite independently of his previous transaction, purchased for £350. These assets he resold at a profit of £600. When A sued B for £742 3s. 10d. damages for the fraudulent misrepresentation, it was contended that, in assessing those damages, account should be taken of the £600 profit from the sale of the assets. Lewis J. held that, although it was the plaintiff's duty to minimize the damages, he was under no obligation to spend money for that purpose. He was entitled to £742 3s. 10d., the whole amount of the loss of his debenture. To rule otherwise would be 'going far beyond the rule' that a plaintiff must minimize his damages (p. 511). Account will be taken only where the plaintiff is under a duty to minimize his damages, as where a man, wrongfully dismissed, must seek employment elsewhere. The element of risk in a further expenditure removes it from the sphere of his duty; where, therefore, the risk is undertaken and a profit made, it is patent that a defendant should not be entitled to have that profit brought into account. In this case all that the plaintiff had received for his investment of £1,000 was £257 16s. 2d.; his subsequent purchase and advantageous sale of the assets was an independent transaction.

In *Houndsditch Warehouse Co., Ltd. v. Walex, Ltd.* [1944] K. B. 579, Stable J. held that where, after breach of the contract, there seemed to be an offer the acceptance of which, on clarification of its terms, might have meant mitigation of damages without compromising the claim to those damages, it was unreasonable of the plaintiff not to enquire further as to the nature of the offer.

J. J.

CONTRACT—ILLEGALITY—CONTRACT MADE WITH NEUTRAL HELD UNAFFECTED UNLESS AT LEAST SUBSTANTIAL PROBABILITY OF BENEFITING ENEMY.

Schering, Ltd. v. Stockholms Enskilda Bank. [1944] Ch. 13.

By a contract made in February, 1936, a German company agreed to buy from a Swedish bank £84,000 worth of reichsmarks, and to pay £50,400 sterling in eight years by instalments. An English firm guaranteed payment. In April, 1936, the English firm undertook to pay as principals if the bank would assign to them the same sterling amount of the bank's claims against the German company. They deposited a sum as security for their liability. Some instalments were paid and assignments made. War broke out. Payment of further instalments was prohibited by the Trading with the Enemy Act, 1939: *Stockholms Enskilda Bank v. Schering, Ltd.* [1941] 1 K. B. 424. The whole sum is now due. The English firm bring an action for abrogation of the contract and return of the deposit. Simonds J. gave judgment for the English firm on the ground that the contract involved intercourse with the enemy, and would confer an immediate or future benefit on the enemy. The Court of Appeal, reversing Simonds J., held that a contract between a British subject and an enemy differs from a contract between a British subject and a neutral. A state of war abrogates all executory contracts with an enemy which require for their further performance intercourse with the enemy, because they might enhance his resources, and there is a presumption that they will have this effect. But those who impugn a contract with a neutral must show that 'its

performance will in fact enhance the resources of the enemy or that at least there is a substantial probability that this will be the case' (p. 24). Here the payments were suspended during the war, and there was not a clear enough probability of benefit to the enemy during the war to justify abrogation of the contract. This case illustrates the principle that in the absence of clear proof that an enemy is likely to benefit from the performance of a contract with a neutral, it is the policy of the Courts to encourage the loyal performance of such contracts.

O. R. M.

CRIMINAL LAW—CORPORATION—MENS REA—COMPANY HELD CAPABLE OF MENS REA.

R. v. I. C. R. Haulage, Ltd. [1944] K. B. 551.

The appellant company, a corporation, was charged with ten other defendants at Maidstone Assizes with a common law conspiracy to defraud. Before the hearing of the charge, objection was taken on behalf of the company that an indictment alleging a common law conspiracy to defraud would not lie against a limited company. The commissioner of assize refused to quash the indictment, and the jury convicted the company. The company appealed, and the Court of Criminal Appeal dealt exclusively with the question whether an indictment for a common law conspiracy to defraud would lie against a limited company. Counsel for the company contended that a company, not being a natural person, was immune from criminal process, when indicted for an offence involving as an essential ingredient 'mens rea' in the restricted sense of a dishonest or criminal mind, and consequently, though in certain circumstances it may be civilly liable for the fraud of its officers, agents and servants, it cannot be liable criminally. It was argued in reply, that a limited company, like any other entity recognised by the law, can as a general rule be indicted for its criminal acts, which, from the very necessity of the case must be performed by human agency, and which in given circumstances become the acts of the company. Offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases in which, from its very nature, the offence cannot be committed by a corporation, as for example, perjury and bigamy, which cannot be committed vicariously. In dismissing the appeal the Court held that an indictment for a common law conspiracy to defraud will lie against a limited company, and declared the contentions of the Crown to be substantially sound, and the existence of exceptions to be in no way inconsistent with the general rule. The Court, in giving its judgment, drew attention to the latest authority—*Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.* [1944] K. B. 146—which it declared to be applicable in the case under discussion, though it dealt with a limited company charged with offences under a Defence of the Realm Regulation which involved an intent to deceive.

P. J. D.

CRIMINAL LAW—MURDER—ACCESSORY BEFORE THE FACT—'SUICIDE FACT'—SURVIVOR NOT PRESENT AT SUICIDE OF OTHER PARTY—COUNTERMANDING OF AGREEMENT.

R. v. Croft. [1944] K. B. 295.

C and a woman, L, had formed a passionate attachment. They went to a summer-house and agreed to commit suicide. C had with him a loaded revolver, which he had cocked and placed before them. The woman picked up the revolver and discharged it, wounding herself in the left breast. She was in great pain and asked C to go for help, but before he had gone more than a few paces the revolver was

discharged a second time, the woman having either intentionally or accidentally fired a bullet through her brain. C was found guilty of murder and he appealed. The two principal grounds of appeal were: (i) that a survivor of two parties to a 'suicide pact,' who is not present when the crime is committed, cannot be held to be an accessory before the fact, and that the relevant cases on the subject were not of accessories before the fact but of aiders and abettors, because in each case the accused person was present when the suicide was committed; and (ii) that the summing-up did not contain any reference to the possibility of the agreement to commit suicide having been terminated impliedly by the appellant being requested to go for help.

The Court of Criminal Appeal, in dismissing the appeal, held that 'a mutual agreement to commit suicide amounts to such a counselling, procuring, inducing, advising or abetting as constitutes the survivor an accessory before the fact, even if he is not present when the other party to the agreement commits suicide' (p. 297), unless he establishes that he expressly countermanded or revoked the agreement. The Court was of opinion that the appellant had not established such express revocation here.

This case does not lay down a new rule or alter the law in any respect, but merely gives us current authority for a long-standing rule. The American case of *Commonwealth v. Bowen* (1816) 13 Mass. 356, is in some respects similar.

M. N. M.

LANDLORD AND TENANT—HELD THAT A LEASE 'FOR THE DURATION OF THE WAR' WAS INVALID OWING TO THE UNCERTAINTY OF THE TERM.

Lace v. Chantler. [1944] K. B. 368.

In this case the Court of Appeal held that a lease 'for the duration of the war' was void. Lord Greene M.R. said that the law was correctly stated in Foa's 'Landlord and Tenant,' 6th ed. p. 115, '... a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable, either by the express limitation of the parties at the time when the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void.' In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would last. It was suggested that the difficulty could be got over by construing the tenancy as a lease for a long period, such as ninety-nine years, determinable on the cessation of the war, as was done in *Great Northern Railway v. Arnold* (1916) 33 T. L. R. 114. The Master of the Rolls distinguished this case by saying that it could be supported only because there was a term in the agreement that the landlords did not intend that the tenancy should be subject to a week's notice. It was impossible to treat the tenancy, in the present case as a freehold interest, or as a mere licence, for that would involve making a fresh agreement for the parties.

This decision of the Court of Appeal was not well received, because it would seem that legal orthodoxy had triumphed over the more liberal view of effectuating the intention of the parties. The common intention of the parties in these cases was the grant of a valid tenancy for the duration of the war, and the Court might have construed the agreement so as to carry out this intent. However, legislation was sought and the Validation of Wartime Leases Act, 1944 (7 & 8 Geo. 6, c. 34), was passed. It provides that any agreement entered into before or after the passing of the Act, which purports to grant or provide for the grant of a tenancy for the duration of the war shall have the effect as if it was granted for a term of ten years subject to the right of the parties to determine the tenancy by a month's notice in

writing after the end of the war, if the war ends before the end of the term. The Act avoids difficulties of determining when the war ends by providing for the declaration by Order in Council of dates for the cessation of hostilities and other similar events. The Act, however, does not affect a tenancy which had terminated before the Act otherwise than by a notice given by the landlord or the tenant on or after June 13th, 1944.

J. D. G. J.

PERSONAL PROPERTY—INNKEEPER'S LIEN—LIEN OVER STOLEN PROPERTY—HELD:
INNKEEPER ENTITLED TO EXERCISE RIGHT OF LIEN OVER SUCH PROPERTY.

Marsh v. Commissioner of Police. [1944] 2 All E. R. 392.

A stayed as guest at a hotel and incurred a bill for a considerable amount. Whilst staying there he obtained a ring on approval from X & Co. A was unable to pay his bill on demand, but handed over the ring to the hotel authorities as security for payment. A was later convicted of larceny of the ring, which was then retained by the Commissioner of Police. The hotel authorities knew nothing of how A came into possession of the ring. The point at issue was whether the hotel or X & Co. was entitled to the ring. The Court of Appeal, reversing the decision of the Divisional Court, held that a lien attaches to chattels which a guest brings to the hotel in his character as a guest, irrespective of whether it is luggage in the ordinary sense of the word. Furthermore, it attaches as soon as the chattels are brought into the hotel, though the occasion for exercising the lien does not arise until the guest has been presented with his bill. It does not matter whether the innkeeper knows what the chattels are or not. Reference was made to the cases of *Gordon v. Silber* (1890) 25 Q. B. D. 491, and *Robins v. Gray* [1895] 2 Q. B. 501, as authorities for the rule that stolen property can be the subject of a lien. The Court treated as immaterial, the fact that the ring was acquired after A had come to the hotel and the fact that A held it in his exclusive possession until the day before he left the hotel. Moreover, the Court refused to regard the handing over of the ring to the hotel authorities as security, as a separate transaction and independent from their right of lien. Judgment, accordingly, went in favour of the hotel.

It should be noted that an innkeeper is bound to receive every person who applies to be admitted as a guest so long as there is room in the hotel, and there is no good reason for refusing to receive him. The innkeeper must also receive his luggage and other goods reasonably necessary for his sojourn at the inn. He is liable at common law to an action or an indictment if he refuses to receive a person without reasonable cause. In return, the innkeeper has a lien on the goods brought to the inn by the guest.

G. J. H.

TORT—LIBEL—LIBEL OF A CLASS—ACTION BY INDIVIDUAL MEMBER—NO REFERENCE
TO INDIVIDUAL MEMBER.

Knupffer v. London Express Newspaper, Ltd. [1944] A. C. 116.

Defendants published an article in their newspaper adversely commenting on an association of certain Russian political refugees, called Mlado Russ, in terms which, it was admitted, would have been defamatory if written of a named individual. The association had a large membership abroad, but there were only twenty-four members of the United Kingdom branch which was not specifically mentioned in the article. Plaintiff, who was the active head of the United Kingdom branch, contended that the article was a libel on him personally, while defendants claimed that it referred to the activities of the association and not to the plaintiff. The House of Lords

held that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that the words were spoken of him unless there was something to show that the words about the class referred to him as an individual. In this case there was nothing to show that the words referred to plaintiff as an individual, and so his appeal failed. Lord Russell said that the crucial question in these cases in which an individual plaintiff sues in respect of a defamation of a class or group of individuals is whether on their true construction the defamatory words were published of and concerning the individual plaintiff, and unless this can be answered in the affirmative, he has no cause of action (p. 123). The other noble and learned Lords were of the same opinion. Whether an individual member of a group can complain of defamatory matter written about the group is to be decided by asking two questions. The first is one of law and is whether the words are capable of referring to the plaintiff, as it is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff.' The second question is one of fact, and is whether reasonable people who know the plaintiff think that the words refer to him. As the decision of the Court on the first question was in favour of the defendants, the second did not arise and so the fact that witnesses testified that they thought the statement referred to him did not help him.

J. C. F. P.

TORT—INNKEEPER—REFUSAL TO RECEIVE GUEST—ACTION ON CASE—NO NEED TO PROVE SPECIAL DAMAGE.

Constantine v. Imperial Hotels, Ltd. [1944] K. B. 693.

The plaintiff, the well-known West Indian cricketer, sued the defendants for a breach of their duty to receive and lodge travellers. He had booked rooms at the defendants' hotel, but when he arrived the offensive attitude of the management compelled him to leave, and he stayed the night at another of the defendants' hotels. The defendants admitted that they had no justification for refusing admission to the plaintiff; but they denied as a matter of fact that they had done so, and maintained that in any event they had provided him with accommodation elsewhere, and so had discharged their duty towards him. They further contended as a matter of law that the action was not maintainable without proof of special damage.

Birkett J. expressed himself satisfied on the evidence before him that the defendants had in fact refused to receive and lodge the plaintiff; and it made no difference that they had offered him accommodation elsewhere. On the question of special damage, the learned judge pointed out that in trespass, where a forcible act caused direct damage to the plaintiff's person or property, damage was presumed; whereas in case, the causal connexion was less obvious and damage was generally the gist of the action. For historical reasons, this rule was relaxed in the law of defamation, and in malicious prosecution. The chief exception, however, is where the plaintiff has suffered an infringement of a right founded on the common law. There the existence of the right implies a remedy. As Holt C.J. said in *Ashby v. White* (1703) 2 Ld. Raym. 938: 'An injury imports a damage, when a man is thereby hindered of his right.' Birkett J. held that the instant case fell within this doctrine and that the action was maintainable without proof of special damage. But in the absence of such proof he felt unable to award exemplary or substantial damages. The case turned on the historical basis of the innkeeper's duty. The learned judge was pressed to follow *Neville v. London Express Newspaper, Ltd.* [1919] A. C. 368, where the majority of the House of Lords held that the tort of maintenance, though unlawful, was not an invasion of the plaintiff's right, and so was not actionable without proof of special damage. But the learned Judge preferred to treat the case as an infringement of a common law right, and applied the principle of *Ashby v. White*.

R. B. L.-S.

TORT—NEGLIGENCE—INJURY TO CHILDREN TRESPASSING ON MINEFIELD—OCCUPIER
NOT LIABLE.

Adams (and Another) v. Naylor. [1944] K. B. 750 (C. A.).

Certain sand dunes, which in peace time were much frequented by children, were mined in 1941 by the military authorities. A substantial fence, 6 feet high, was erected around the minefield, and prominent warning notice-boards were posted at intervals. As a further precaution, at the instance of the military, local education authorities had instructed their pupils of the danger. In March and July, 1942, high winds had caused the sand to silt, and for some 15 yards along the border of the minefield the ground level had been raised to within 15 inches of the top of the fence, leaving one single wire visible. The sand had also made the warning on an adjacent notice board invisible. In August, 1942, three young boys playing in the vicinity stepped across the wire to retrieve a ball. A mine exploded, killing one boy and injuring another.

Their parents sued the officer in control for negligence.

The C. A. (Scott L.J. dissenting) giving judgment for the defendants, held that the boys were trespassers and (according to Morton, J.) that in spite of the condition of the fence, they well knew this. The case also related to the meaning of 'war injuries,' but we are not concerned with this here.

Scott L.J. carefully considered all the facts, and, in view of the highly dangerous character of the land and its proximity to a children's favourite playground, he was of the opinion that the military authorities were liable either because they were under a positive duty to make entrance impossible, in view of the appalling danger of the minefield, or because they were so indifferent to the adequacy of the fence that they must be regarded as having permitted the children to enter. For a note in support of this view, see 60 L. Q. R. 305—307.

The majority did not share this view. *Prima facie* the boys were trespassers, and in that case the law (as summarised by Lord Hailsham in *Robert Addie & Sons, Ltd. v. Dumbreck* [1929] A. C. 358, at 364) was well established: the occupier was merely under a duty to abstain from positive acts of misfeasance. Unless there were circumstances to raise the boys' status to that of licensees (Salmond, 9th ed., p. 534), as by tacit acquiescence, or by the presence on the land of an 'allurement,' as in *Cooke v. Midland G. W. Ry. of Ireland* [1909] A. C. 229—and the Court was of the opinion that no such circumstances existed in the present case—the children were under the same disabilities as adult trespassers.

There was no legal duty (per Morton J. at p. 764) on the occupier to prevent entry, though considering the unenviable legal position of the trespasser the moral duty, in the present case negligently disregarded, was undoubtedly strong.

H. M. I.

TORT—NEGLIGENCE—MASTER AND SERVANT—CARTER ORDERED TO DRIVE RESTIVE
HORSE—*VOLENTI NON FIT INJURIA* INAPPLICABLE.

Bowater v. Rowley Regis Corporation. [1944] K. B. 476.

B, a carter employed by the defendants to collect road sweepings, was ordered by the defendants to use for his work a horse which both parties knew to be restive. B protested, but eventually complied with the order. The horse ran away and the plaintiff was injured in consequence. He sued the defendants for negligence. The Court of Appeal, reversing the decision of Singleton J., held that the defendants were liable, and that the plea of *volenti non fit injuria* was inapplicable. The Court pointed out that in the case of master and servant the maxim *volenti non fit injuria* must be applied with caution. Where a servant is engaged specifically for a

dangerous operation, and this is known to both parties at the time of the contract, the servant clearly undertakes the risk in return for a higher remuneration. In such a case the maxim would be applicable. But where a servant whose work is not normally dangerous is asked to undertake a risky operation the master must show that the servant undertook the risk, and was a volunteer in the fullest sense. Scott L.J. pointed out that a man cannot be said to consent to anything unless he is in a position to choose freely with regard to the matter and if there is present in his mind any feeling of compulsion he does not possess freedom of choice. In the present case the Court held that it was no part of the plaintiff's employment to manage unruly horses and that he had not accepted this extra risk.

It is to be noted that the plaintiff did in fact consent to the risk of being injured, but as he consented only under protest and to a risk which was not a normal incident of his employment, it was held that he could recover.

D. C. H.

TORT—NUISANCE—HELD: OBSTRUCTION OF THE HIGHWAY BY AN UNLIGHTED VEHICLE IS NOT *IPSO FACTO* A NUISANCE.

Maitland v. Raisbeck. [1944] K. B. 689.

An omnibus, on a dark night overtook and collided with defendant's lorry proceeding in the same direction. The collision, it appeared, was caused by the failure of the lorry's tail light, and the plaintiff, a passenger in the omnibus, was consequently injured. The question for the Court of Appeal was whether the defendants were liable for nuisance, and it was held that they were not. Lord Greene M.R. said: 'Every person who uses the highway, must exercise due care, but he has the right to use the highway, and, if something happens to him which, in fact, causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that *ipso facto* and immediately a nuisance is created' (pp. 691—92).

It was held that *Ware v. Garston Haulage Co., Ltd.* [1944] K. B. 30, did not lay down a rule of strict liability in such nuisances, but was distinguishable as having been decided on special facts. Admitting that *Ware's Case* turned on very special facts, it is extremely difficult to find a material distinction between the cases. In each case (1) The lorry was lawfully on the road. In *Ware's Case*, although the lorry was stationary, stopping on a highway for a reasonable time and in a reasonable manner is not unlawful in itself: *Original Hartlepool Collieries v. Gibbs* (1877) 5 Ch. D. at p. 721, *per* Jessel M.R.; (2) The light worked perfectly when switched on and later failed—neither driver was proved to have knowledge of any defect; (3) Neither case was decided by the Court of Appeal on the ground of negligence.

In *Ware's Case* great emphasis was placed on the fact that the defendant had a reasonable amount of time to provide lamps against obvious risks; but is this material? The lorry's lights, which were not defective to the defendant's knowledge, would have been adequate, without other lamps. And as no duty was cast, in *Maitland's Case*, on the driver to inspect his rear light at intervals, the driver in *Ware's Case* ought to have incurred no liability for leaving a lighted lorry unattended on the highway. It is submitted that *Ware's Case* greatly extended liability in nuisances involving obstruction of the highway. This is clear from the judgment of Scott L.J. But the judgment in *Maitland v. Raisbeck* is more in accordance with previous decisions and the opinions of text writers; the Court of Appeal there pointed out that the language of Scott L.J. must not be taken literally and out of context with the facts of *Ware's Case*.

R. A. F. K.

TORT—NEGLIGENCE—RES IPSA LOQUITUR.

Easson v. L. & N. E. Ry. Co. [1944] K. B. 421.

A boy, aged four years, was travelling with his mother on an express corridor train from Newcastle to London. Soon after the train left Grantham he was allowed by his mother to go to the lavatory alone. Whilst in the corridor of the coach he fell through a door on the off-side of the train on to the railway line, and was injured; there was no evidence how the door became open. It was argued before the Court of Appeal that, since the boy was too small to have opened the door himself, the rule, *res ipsa loquitur*, applied and that it was therefore for the defendants to establish absence of negligence. The Court of Appeal unanimously held that the rule did not apply and that the defendants were not liable. Both Goddard and du Parcq L.JJ. considered that *Gee v. Metropolitan Ry. Co* (1873) L. R. 8 Q. B. 161; *Burns v. North British Ry. Co.* 1914 S. C. 754; and *Inglis v. L. M. & S. Ry. Co.* 1941 S. C. 551, which the appellants claimed were in their favour, only showed that in the circumstances of each of those cases there was evidence on which the jury could find a verdict for the plaintiff. Goddard L.J. held that neither the doctrine of *res ipsa loquitur* nor a doctrine analogous to it applied in the present case, since it was impossible to say that the doors of a long-distance express corridor train were continuously under the sole control of the railway company; he further considered that the evidence showed that the company had taken reasonable precautions. Du Parcq L.J., however, after discussing the doctrine of *res ipsa loquitur* for the greater part of his judgment, omitted to consider whether that doctrine applied in the present case, but agreed that the appeal must be dismissed on the ground that if the door was perfectly fastened when the train left Grantham the company had clearly not been negligent, whilst even if the door was imperfectly fastened in the sense that it was on the safety catch there was no danger to anybody if nobody interfered with it. As Goddard L.J. held that the company was not continuously in sole control of the door, there was no need for him to consider fully the doctrine of *res ipsa loquitur*, the scope and effect of which have recently aroused some controversy in the Scottish courts. In particular, he had not to consider the accuracy of plaintiff's argument, that *res ipsa loquitur* threw the onus on the defendants to establish absence of negligence, which is incorrect if we accept the view of Lord Dunedin in *Ballard v. North British Ry. Co* 1923 S. C. (H. L.), 43, 54—55, as explained by the Lord President in *O'Hara v. Central S. M. T. Co.* 1941 S. C. 363, 376—78; what the defendant must do is to put forward a reasonable suggestion that the facts show that the accident occurred consistently with due care on his part; if he does that, the plaintiff must then give positive proof of negligence.

J. A. H.

WILL—TESTATOR'S NAME ON BACK OF PAPER AND ON CONTAINING ENVELOPE.

In the Estate of Bean. [1944] P. 83.

The testator, using a printed will form, wrote what purported to be his will. It was completed down to the attestation clause, but not signed by the testator. He did, however, write his name on the back of the will, and also filled in the spaces on the printed envelope, putting down his name, address and the date, and at the same time designating his wife as executrix. The attesting witnesses, one of whom saw the envelope on the table, signed the form, the testator then folded the form and gave it to the executrix, who had been present during the whole transaction.

Held, by Hodson J.: The motion to admit the document and the envelope to probate, as together forming the true last will of the deceased, failed on the ground that the name, 'George Bean,' on the envelope was not the signature to the will.

Hodson J. stated that the question was, whether the requirements of the Wills Act, 1837, s. 9, 'Signed at the foot thereof,' were satisfied. The meaning of the words, 'at the foot' could, by the Wills Act, 1852, be widely interpreted, so that it was necessary to determine: (i) Whether the name 'George Bean' on the envelope was a signature at all, and if it was (ii) Whether it mattered that the signature and will were on two pieces of paper. The executrix had contended that the facts were so similar to those in *In the Goods of Mann* [1942] P. 146, that the two cases were indistinguishable. Hodson J. had seen the documents of that case. It had been a holograph will witnessed under the attestation clause, and signed by the testatrix on the envelope, both documents being pointed out by her as being her will. Langton J. in that case had found the signature on the envelope to be the signature to the will. Hodson J. said that he thought it impossible to consider the name on the envelope to be the signature to the will. It had, he considered, been put on the envelope, not to give effect to the will, but purely for the purpose of identification, as had the endorsement on the back of the paper, which had, however, not been seen by the witnesses. It appeared that the omission to sign in the appropriate space was purely accidental. The motion failed, therefore, on the ground that the name 'George Bean' on the envelope was not the signature to the will. Hodson J. added that if it had been possible to find the name on the envelope had been put there as the signature to the will, he would have regarded the facts as identical with those in *In the Goods of Mann*.

M. V. H.

BOOK REVIEWS

Mental Abnormality and Crime. English Studies in Criminal Science, vol. II. Edited by L. RADZINOWICZ, M.A., LL.D., and J. W. C. TURNER, M.C., M.A., LL.B. Macmillan & Co., Ltd. London. 1944. xxiv and 316 pp. (18s.)

The interest of the general public in Crime is increasing, so journalists have told me. I only wish that it was possible to feel much encouraged by this development, but I fear that the man in the street very rarely puts his mind much closer to the problem of Crime than by reading reports of sensational trials or heavy punishments.

With a feeling of relief I opened and read this series of Essays and I closed the book with a sense of considerable gratitude to all those who have helped to produce it.

Such a book has long been wanted by many citizens because, as Professor Winfield says in his Preface, 'all of us who have had anything to do with the administration of criminal law, even in the humblest of capacities, must have realised the vital importance of getting a correct picture of the mental equipment of the accused person.'

The thirteen essays are written by members of the medical profession, and I am not qualified to criticise the book from the medical angle. The medical profession and many lawyers will welcome the names, among others, of R. D. Gillespie, D. K. Henderson, W. Norwood East and Edward Glover; there is no doubt that the editors have to be heartily congratulated upon organising such a team.

The various subjects, however, are difficult ones upon which to give instruction. Studies in Criminal Behaviour in relation to such matters as Psychosis, Psycho-neurosis, Mental Deficiency, Psychopathic Constitution, Physical Factors, Alcoholism and Sex, to mention some of the subjects, have been treated with great care and much learning, but with markedly varying degrees of lucidity.

I do not think that any practising lawyer can have had the opportunity to look over these essays before they went to press for he would then, while expressing real admiration and gratitude to the various authors, have begged the editors to set about much pruning, simplification and improved style, almost throughout the book.

I venture to make these particular criticisms, which I hope will be thought just and helpful, because when future editions come out, and come they must, there should be in existence a book which could be confidently recommended to every lawyer and magistrate, and, indeed, to every person who has taken on the enormous responsibility of administering justice. To recommend so widely the first edition would be in the belief that there is widespread enthusiasm for this class of instruction, whereas the attention and sympathy of many must be carefully wooed and by no means taken for granted.

A growing number of members of the legal profession are longing for closer co-operation with the doctors so that the latter may make available to us certain basic instruction in psychology, which is still nothing more than a heartfelt want.

Perhaps (or is it sighing for the moon!) we may live to see higher judicial officers provided with a first class, short course of instruction in Applied Psychology before the Crown will consider their appointment or advancement. It would be little trouble and a blessing to many miserable persons who pass so unendingly through the docks of our Courts, day in day out.

Meanwhile the lawyers, the doctors, the newspaper men, the readers of crime novels and crime reports, all owe the criminal a debt, which is more than a debt of gratitude, and they can help to repay it by seeing that knowledge of such matters as are set out in this book are more and more widely diffused.

To you the Editors and the Authors, Pioneers, I make a humble salute and my

own small contribution to the thanks which will be felt by every reader of this book, provided, and here's the rub, he or she really hates Crime and does not hate the Criminal.

JOHN MAUDE.

Legal Effects of War. By SIR ARNOLD DUNCAN MCNAIR, C.B.E., LL.D., F.B.A. Second Edition. Cambridge: At the University Press. 1944. xx and 416 pp. (25s. net.)

This is one of the outstanding books that have been published during the war and in relation to it. Sir Arnold's profound learning and conspicuous ability are so well known to all of us, not only in his published works, but also in his wide range of public activities, that we are fortunate in his production of a book on a subject of great topical interest and of considerable difficulty because of its wide extent and, in some respects, the uncertainty of the law relating to it. The results of his investigation are such as to put practitioners and teachers under a heavy but welcome debt of gratitude to him. Whether the reader seeks for information on the principles of the law as it has been, as it is, or as it ought to be, he will find this volume helpful. It is, as the author indicates, only nominally a second edition of the book published in 1920, for most of it is new, and it is more than twice the length of its predecessor. It is concerned with the principles of the law, and it rightly makes no attempt to include the jungle of emergency legislation. Unfortunately the book had gone to press too early to enable Sir Arnold to incorporate in it, as a separate chapter, his article in 60 *Law Quarterly Review*, 160—74, on the Law Reform (Frustrated Contracts) Act, 1943. There are, of course, several citations of the Act in this volume, but inclusion of the article would have been welcome, for we know of no survey of the Act that is of such practical assistance.

Sir Arnold notes that few cases of first-rate legal importance have arisen during the present war, but that we shall probably have to face problems arising from the occupation of many countries by our enemies, and from the exile of the governments of most of those countries. Chapters 17 and 18 are devoted to an examination of such questions. The House of Lords have already postulated tests for determining whether belligerent occupation of the territory of an ally affects the persons domiciled there with enemy character in relation to instituting legal proceedings in England; *Soufracht (V/O) Case* [1943] A. C. 203.

With regard to the status of alien enemies in procedure in an English court, a problem which occurred to us some years ago and which does not appear to be covered by any direct authority is whether an alien enemy resident in England, who has not registered as such, can maintain an action against a person who commits a tort against him in this country. On the one hand it is arguable that the general rule, which forbids the bringing of an action by an alien enemy who has received neither the express implied assent of the Crown to his presence in this realm, covers an action in tort just as much as any other remedy, and that this does no injustice to one who in fact commits an offence by not registering. On the other hand it may be urged that to allow him no action is perilously near encouraging something like private war upon him by those who, with impunity, could commit deceit, defamation, nuisance, trespass or any other tort against him; and that, while there is, perhaps, little reason for giving a remedy to one who deliberately abstains from registration, yet it is possible for an alien enemy to have been morally innocent in not having registered: *e.g.*, he may have been negligently knocked over by the driver of a vehicle while he was on his way to the registration centre. Sir Arnold does not deal directly with the question of tort in this connexion, but we gather from what he says at pp. 42—44 that his inclination would be against allowing an action. He discusses the point whether the general rule which disables the injured party from suing is a

strict one or whether it depends on the discretion of the court in applying a flexible rule of public policy. He admits that the majority of the House of Lords, in *Rodriguez v. Speyer Bros.* [1919] A. C. 59, preferred the latter view, but in his opinion the former is preferable, having regard chiefly to the history of the rule. We agree that it is always advisable to investigate the history of a rule in order the better to understand its present scope, but we suggest that circumstances may make it proper to qualify a rule established long ago, unless there is decisive authority against the possibility of modifying it. In the case under discussion we know of no such decisive authority. In *Mercedes Daimler Motor Co. v. Maudslay Motor Co.* (1915) 31 T. L. R. 178, a German company was allowed to be joined as co-plaintiff by a British subject in an action for infringement of a patent of which they were joint owners; such an action is unquestionably one in tort, but neither the decision in this case nor the approval of it expressed in *Rodriguez's Case* gives the least ground for inferring that such an action would have been maintainable by an alien enemy suing *solus*. There is thus no decision on our problem, but the basis of the general rule accepted by the House of Lords in *Rodriguez's Case* does at least leave the question an open one.

We have noticed only one verbal slip in the book; at p. 328, note 2, '[1933]' ought to be '[1943].'

P. H. W.

Liberties and Communities in Medieval England: Collected Studies in Local Administration and Topography. By HELEN M. CAM, Litt.D. Cambridge University Press. 1944. xiv and 267 pp. (15s.)

The friend who suggested to Dr. Cam, author of the classic account of *The Hundred and the Hundred Rolls*, that she should collect some of her articles in a volume, showed excellent judgment, for the first issue was promptly, and deservedly, sold out. The essays are beyond the scope of the undergraduate student of legal history, but the few in whom their university studies have inspired a taste for that subject should note this fascinating book for future reading. A summary of its contents has been made accessible to lawyers by Dr. Chrimes in the *Law Quarterly Review* for January, 1945.

From a legal point of view the most relevant essays are the two entitled respectively '*The Quo Warranto Proceedings under Edward I*,' and '*The Decline and Fall of English Feudalism*.'

In the former attention is called to the fact that *Quo Warranto* proceedings were not a new departure, as is commonly stated in text-books. The writ had a long history behind it. And Dr. Cam disproves the commonly accepted statement that Edward I began by requiring any holder of a franchise to produce a royal charter in proof of his claim, and by disregarding pleas of long-continued usage, but subsequently, in 1290, accepted a compromise, embodied in the two statutes of *Quo Warranto*. She adduces a ruling given by the two Benches concurrently in 1279, which contains the statement, 'every liberty is royal and belongs to the Crown, or to him who has sufficient warrant either by charter or from time immemorial.'

The latter article is concerned with the Tudor attack upon the 'bastard' feudalism of the 15th century, 'a parasitic institution, deriving its strength from a system hostile to itself, cut off from its natural roots in the soil, and far removed indeed from the atmosphere of responsibility, loyalty and faith which had characterized the relationship of lord and vassal in the earlier Middle Ages.' Probably few know that the grand old patriot Sir John Fortescue recommended a stricter enforcement of the royal rights of wardship and marriage, or that Richard III anticipated Henry VII in sending out commissioners to inquire what tenurial dues were being concealed from the King. And, as has been shown by Miss Brodie, Henry VIII's

court of wards and liveries was anticipated by Henry VII's short-lived *Supervisor of the Prerogative*, who fell with Empson and Dudley. This makes one wonder whether a tardy rehabilitation is not due to those men, whose memory survives as that of a twin-headed monster of extortion. Edmund Dudley was a lawyer of Gray's Inn, of whom the historian Polydore Vergil (*circa* 1470—1555), records that the precocity of his legal learning was such that Henry VII made him a Privy Councillor at the age of twenty-three. He delivered a reading on the Statute of *Quo Warranto*, which was recently discovered by Miss Putnam, and is being edited by Miss Brodie. Students of the period look forward with pleasure to its publication and to the comments which, it is to be hoped, Dr. Cam will make upon it.

H. A. H.

The Elements of Roman Law, with a translation of the Institutes of Justinian. By R. W. LEE, D.C.L., F.B.A. London: Sweet & Maxwell. 1944. xxiii and 488 pp. (27s. 6d. net.)

The appearance of a new text-book on Roman law is an event expected with eagerness by all students of this subject. Two questions present themselves immediately: how has the author approached his task and what contribution has he made to our knowledge?

As an authority on modern civil law systems, Professor Lee is interested, above all in the practical working of Roman law and its significance for modern civilians. This explains why he has chosen a method, unusual in the present century but universally applied in former times when Roman law still provided the living background of continental systems of law. Justinian's legislation provides the core of this text-book, while classical law is treated as a historical sideline to be followed up when the need arises. Professor Lee is, of course, fully aware of the divergencies which distinguish the law of these respective periods, and is acquainted with the vast literature which has attempted to discover the classical or post-classical origin of institutions incorporated in Justinian's work, but the reader finds it difficult at times, to see which stage in the history of Roman law is being unravelled before him.

Thus in D.6.1.23.5 (p. 127) the *actio in factum* for compensation in respect of accessions to movables which cannot be disannexed may be post-classical. Similar thoughts occur in connexion with D.42.1.19, I, allowing a donorto plead the *beneficium competentiae* (p. 145). The provision in D.7.1.56 [*et placuit-est*] limiting the usufruct enjoyed by corporate bodies to 100 years is not one of classical law (p. 164, n. 9). On p. 282 attention is drawn to the development from *custodia* to *culpa*, but when individual institutions are discussed Justinian's standards of liability are adopted exclusively. The prohibition of set-off in the *actio depositi* (p. 288, n. 44a) dates from 529 A.D. (C.4.34.11 pr.). In the law of sale the rule that the price is ascertained if it is to be fixed and has been fixed by a third person (p. 305) was laid down by C.4.38.15.1.2; Inst. 3.23.1; Gaius III, 140, expressed doubts. The attempt (p. 315, n. 19) to explain why both parties to a *locatio conductio operis* are treated as *locator*es in D.19.2.22.2 is strained. Probably the solution can be found in D.18.1.20. D.2.14.7.12 (p. 342, n. 12) stating a rule similar to that in *Rose & Frank v. Crompton* [1925] A. C. 445, is the work of the compilers. In D.41.2.49.2 the right of the principal to sue the agent for an assignment of actions which the agent has against a third party (p. 357, n. 46) is an addition [*sed ea—cedere cogitur*]. On the other hand, in the section dealing with suretyship the *beneficium cedendarum actionum* is presented in its correct historical perspective. The statement that medical expenses incurred for the benefit of a slave can be recovered under the *lex Aquilia*, although the Aquilian action does not lie if harm is done to a slave of no value (p. 387), represents the law in D.9.2.27.17, but it is at variance with Coll.2.3. See Buckland

(1923—24), 33 *Yale L. J.* 352. The passage in D.9.2.27.14 according to which a *colonus* may sue for damage to crops provided security is given to the defendant against further proceedings by the owner (p. 388) cannot be accepted without a critical examination. According to D.45.1.1.4 a stipulation for a greater sum includes a lesser amount (p. 339), but the text may well be interpolated.

When confronted with disputed questions, Professor Lee steers a middle course between conservative and more modern trends. Faced with the discrepancy between D.1.2.2.49 and G.I.7 he suggests that originally the *responsa* of living jurists alone were binding and that this authority was subsequently extended to jurists who were no longer living (p. 17). Here a reference to the doctrine set out by Monier, *Manuel de droit romain*, I, no. 69, might have been useful. The difficult question as to how far a distinction can be drawn between *jus naturale* and *jus gentium* is approached with caution (p. 35), but Inst.2.1.11, adduced in order to show that in theory the identification was complete, must be read in connexion with D.41.1.1. pr. which shows no such identification. On the other hand, the interesting view expressed by Siber, *Römisches Recht*, II, pp. 7—9, that natural law was originally concerned with persons and family relations only is supported by D.1.1.1.3 and Inst.1.2. pr. According to recent writers free marriage dates back to a very early time and it is unlikely that the *trinoctium* of the XII Tables marks its starting point (p. 64). D.26.2.4. according to which a mother could leave property and appoint a tutor to manage it (p. 85), confuses tutors and curators. The passage on putative titles (p. 117) must be read in connexion with Buckland, *Text-book of Roman Law* (2nd ed.), p. 246 (lxxxviii). D.41.8.4. cited (p. 118, n. 30) as an example of a putative title is interpolated. Better instances, although also partly interpolated, are D.41.4.11; D.41.10.3.5. Professor Lee states (p. 310): 'there are indeed texts which . . . may be cited to show that in the classical period of Roman law the risk did not pass to the purchaser until delivery' and quotes Paul D.18.6.13 (12), 15 (14) pr., but these texts are open to another interpretation. The accident envisaged by the texts is the destruction of the beds by the *aedilis*, while the question between vendor and purchaser is whether the vendor was negligent in exposing them to the action of the *aedilis*. The answer is that he was negligent and must bear the risk of their destruction unless the beds had been handed over or the purchaser was *in mora*.

Since this text-book is likely to run into several editions the following misprints and errors may be mentioned. D.1.5.17 and Nov.78.5 are not the only texts dealing with the *Constitutio Antoniniana* (p. 53, n. 45) a Greek version of which is to be found in Papyrus Giessen 40. For D.25.2.5 (p. 63, n. 89) read D.23.2.5; p. 70, n. 20 (Inst.3.10.1) read Inst.3.10.2; p. 159, n. 79 (D.6.2.11) read D.6.2.11.1; p. 234 (Inst.2.21. pr. 1, 2, 3) read Inst.2.22. pr. 1, 2, 3. The accompanying translation of Justinian's Institutes is consistently good and the critical comparisons with modern systems of law always interesting. To sum up: Professor Lee has written a lively book which should prove a useful guide to many generations of students.

K. L.

The Law Reform (Frustrated Contracts) Act, 1943. By GLANVILLE L. WILLIAMS, Ph.D., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1944. viii and 91 pp. (7s. 6d. net.)

It may be said that the law concerning frustration is still at a stage of active growth, and the statute which is the subject of this work is designed to remove certain factors which have proved inimical to its free development. The Law Revision Committee in their report on *Chandler v. Webster* and the *Fibrosa* decision provided most of the basis for the Act, which, while not affecting the incidence of frustration, seeks to ensure a greater measure of substantial justice in its results. Where the circumstances of each case may be of the widest diversity it is clear that

ample judicial discretion is desirable in working out the financial adjustments necessary between the parties to a frustrated contract and consequential upon the operation of the Act, the terms of which are so worded that such discretion is a recurrent *motif* to be found therein. It may be thought that Dr. Glanville Williams has been so astute in detecting difficulties that he has been a little sparing of credit, both to the draftsmen, who framed it, and to the occupants of the Bench, who may apply it, but this does not detract from the fact that his book is a piece of analysis of singular penetration, as remarkable for its courage as for the knowledge with which it is backed.

In the course of a short review it is only possible to comment upon a few of those 'nice sharp quilllets of the law' which are to be found on every page, and which will give the reader much upon which to ponder. Dr. Glanville Williams first examines the Act in relation to *Appleby v. Myers*; the *Fibrosa* decision, and *Whincup v. Hughes*. The first and last have long been regarded as productive of unfortunate results, and the Act, in giving the quasi-contractual remedy under sect. 1 (3) abrogates the rule in the former in the case of frustrated contracts, and by sect. 1 (2) also provides a quasi-contractual remedy where the rigours of the latter have in the past prevented appropriate adjustment in such cases. In these circumstances the careful dissection of the law as it existed before the Act came into force, while of considerable interest, does not convince the reader that those whose duty it will be to give effect to the new provisions will have to resort to a discussion of the earlier law in order to apply them. The subject of partial failure of consideration has an abiding charm for the learned author, and in this connexion it may be submitted with deference, that the close arguments on pp. 14 *et seq.* would gain in simplicity if recognition were given to the point made by Viscount Simon L.C. in the *Fibrosa* case, namely, that in the use of the traditional but dubious phrase 'failure of consideration' it is usually the performance of the promise which is the consideration there indicated (see also Williston on Contracts, § 814). Would not this be of assistance also in removing the 'great difficulty' in the cases discussed on p. 32 in relation to the Act?

Passing to the text of the Act Dr. Glanville Williams is perturbed that its operation should be confined to English law. But as Professor Gutteridge has said (61 L. Q. R. (1945), at p. 98) his objection does not apply to a case of purely domestic legislation, and it is worthy of note that Sir Arnold McNair in his analysis of the Act (60 L. Q. R. (1944), pp. 160 *et seq.*) does not appear to share the author's feeling that this is a 'juristic blunder.' The application of the proviso to sect. 1 (2) also causes him anxious doubts. In giving the Court power to deduct up to the amount of expenses incurred by a payee under a contract to which the Act applies from the amount repayable by him (not being greater than such amount) no restrictions are imposed upon the method of assessing the proper amount of those expenses. The Law Revision Committee in their report on *Chandler v. Webster* rejected the principle that the loss following frustration of a contract should be shared between the parties, but Dr. Glanville Williams would prefer this method, which he thinks is in greater accord with natural justice. Sub-ss. (2) and (3) of sect. 1 are carefully complementary, the latter enabling either party to recover from the other up to the amount of a benefit derived by that other, taking into account expenses or payments he has incurred, and again the wording is nicely discretionary, regard being paid to what the Court may 'consider just' and 'all the circumstances of the case.' The combined effect of these provisions surely goes far to give effect to the opinion of the House of Lords in the *Fibrosa* case (and in particular to Lord Wright's speech), where it was emphasized that, though their decision would reverse that of *Chandler v. Webster*, further problems of unjustifiable enrichment could not be adequately dealt with without legislation. In their day to day work judges and arbitrators are not particularly daunted by a plethora of claims and cross-claims to be balanced against each other, and it may be felt that Dr. Glanville Williams might have had greater confidence in their capacity to reach a just solution; also that his ingenious

examples of cases where there has been a good speculation, a bad speculation, or that a party has contracted to pay too much or too little or the like, are sometimes a trifle unreal. This is not to suggest that the Court's task will be easy: and we agree that the wording of sect. 1 (3) (b) ('the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract') is most obscure, though once more it plainly emphasizes the Court's discretionary powers. It might be that the exercise of a prohibitory government order would have the effect of destroying a project contemplated by the parties, leaving uncompleted works of some value, to be utilised in some other way than that originally contemplated or the effect might be that after a period of delay, and though the original contract should be frustrated, it would be possible for the parties to enter into a new contract which would provide for completion in the contemplated form. In such circumstances the effect of the prohibition might be some guide to the quantum of any benefit. All such questions remain open, but where a judge or arbitrator has applied the mechanism of the Act appellate Courts will presumably be chary of disturbing his findings, as Dr. Glanville Williams points out in quoting Lord Wright in *British Fame v. Macgregor*.

Further admonitions to the Courts are to be found on pp. 43 and 55, but is a judge really likely to award expenses, which pertain to the 'remote preparation' for a contract and is it necessary to tell him that 'the Court should exercise caution in allowing overhead expenses'?

The author is still unable to reconcile himself to the principle that discharge for frustration is automatic, and maintains that the rule cannot be regarded as beyond recall. But, in view of the body of considered opinion of the highest judicial authority, surely such recall is not now to be achieved, even by 'prayer and plaint' (see, for instance, Lord Wright in *Denny, Nott & Dickson, Ltd. v. Fraser & Co., Ltd.* [1944] 1 All E. R. 678, at p. 683).

One of the most interesting and challenging parts of this work is devoted to criticisms of sect. 2 (5), where the author regrets that the Act (following the report of the Law Revision Committee) excludes from its operation charterparties other than time charterparties, or by way of demise; on this the reader may well compare Sir Arnold McNair's article referred to above. Another penetrating discussion relates to 'specific goods.' The scope of that phrase, as used in the Sale of Goods Act and not separately defined in the Act under review, which does not apply to contracts for specific goods, has been the subject of considerable divergence of opinion, and as Dr. Glanville Williams shows, cases may well arise where it is necessary to decide whether the Act applies or not.

Where an author wields so forceful and provocative a pen, and is gifted with such fertility of imagination it is inevitable that a short notice dwells upon the more controversial aspects of his work. Dr. Glanville Williams deserves the thanks of all those who are interested in the development of the law for having undertaken so difficult a commentary with such thoroughness and in so stimulating a fashion.

R. P. F. R.

Prisoners of War. A Study in Development of International Law. By WILLIAM S. FLORY. American Council on Public Affairs. Washington, D.C. 1942. 179 pp. (\$2.75.)

The treatment of prisoners of war has, during the Second World War, constituted one of the aspects of warfare with regard to which the opposing belligerents have remained, on the whole, within the orbit of accepted customary and conventional rules. Of this fact some recent judicial decisions provide a significant illustration. In 1942 a South African court annulled the conviction, on a charge of larceny, of a number of Italian prisoners of war on the ground that, contrary to Articles 60—67 of the Geneva Convention of 1929, the Protective Power had not been informed of

the judicial proceedings pending against the accused. (*R. v. Giuseppe*, *South African Law Journal*, 60 (1943), p. 267.) In the same year a Canadian court acquitted a German prisoner of war accused of breaking and entering and theft, on the ground that at common law a prisoner of war was not punishable for attempting to escape or for doing anything reasonably calculated to assist him in his escape or to preserve his liberty. (*Rex v. Gunther* (1943) 80 Canadian Criminal Cases, p. 279.) Mr. Flory's book does not contain an account of these cases or, in general, of the conduct of the belligerents during the Second World War. But it is a learned and informative survey which will be found useful by any one writing an account of the practice of States since 1939. Of particular interest are the chapters on the various categories of prisoners of war, on their status and maintenance, on their work and the payment for it, and on the release of prisoners of war.

The author gives a good analysis of the Geneva Convention of 1929. While most of his conclusions are acceptable, his treatment of the questions of reprisals against prisoners of war is cursory and controversial. The Geneva Convention prohibits, without qualifications, reprisals against prisoners of war. Probably it does not forbid reprisals against them adopted in retaliation for the violation of the Convention itself—a solution apparently proposed by the British delegation at the Geneva Conference. The author expresses no opinion on the subject, except that the Convention has not altered the customary rule of international law in the matter. Another question on which it would have been of advantage to have the view of the author is to what extent the provisions of the Convention with regard to judicial proceedings against prisoners of war apply to prosecutions for war crimes committed prior to capture.

H. L.

Justice and World Society. By LAURENCE STAPLETON. Chapel Hill. The University of North Carolina. 1944. 150 pp. (\$2.)

It is not surprising that there should be a revival of the interest in natural law at a time when the temporary success of dictatorship revealed once more the inadequacy of the conception of law and of the State based on force only. T. H. Green has been repeatedly taken to task by analytical lawyers for having said, with reference to the autocratic Czarist rule: 'We only count Russia a state by a sort of courtesy' (*Principles of Political Obligation*, p. 132). But no degree of impatience with the notion of the law of nature can do away with the fact that it is difficult to give up irrecoverably a higher standard—the higher law—by which any existing legal order and its claim to obedience can be judged. The law of nature was one of the few issues which disturbed the almost uninterrupted harmony of views between Sir Frederick Pollock and Mr. Justice Holmes. The former described as denying any moral basis of law the opinion, apparently held by Holmes, that there is no natural law of which the lawyer can properly take notice. (*The Pollock-Holmes Letters*, vol. I (1942), pp. 274, 275.) Mr. Justice Holmes's attitude to natural law was influenced by the fact that he saw it repeatedly abused in defence of entrenched economic interests opposing social progress in the name of various 'natural rights' of man.

Is it permissible to generalize that phenomenon and to maintain—as, for instance, does Kelsen—that, as a matter of history, the function of natural law has been to lend support to the established order and to provide a powerful weapon for use by the forces of reaction? The author of this ably and fervently written book does not specifically investigate this question—perhaps the crucial question in the controversy centering round the law of nature. But her answer may be gauged indirectly from the fact that she sees in the law of nature not a source of concrete rules of law, but a standard of justice. This, in conjunction with her insistence on the universality

of the law of nature, is the main theme of the book—a theme which the author develops with much learning and persuasion. In addition, the reader will find most instructive Professor Stapleton's criticism of the purely historical attitude to the problem, such as may be found in the writings of Vico and Herder. The same applies to the analysis of Stammler's conception of natural law with a variable content. Professor Stapleton's approach is not one of a professional lawyer, but it is clear that she has made a valuable contribution to the subject at a time of a widespread revival of the interest in natural law. There are signs that lawyers—and others—are abandoning the facile and unprofitable line of argument to the effect that as natural law can prove everything it proves nothing—an argument which Bentham advanced with more acumen than discretion. The main reason of his opposition was, of course, the conviction that the cause of conscious legislative reform may be obstructed by reliance on vague and elastic notions which may be invoked in support both of progress and reaction. It is to be hoped that some competent scholar will attempt the task, which Miss Stapleton has not attempted, of investigating what in fact has been the predominant role of the law of nature in this respect.

The author refers on p. 15 to Grotius's *De Jure Bellum ac Pacis*. This is a printer's error. But the author must bear the responsibility for the inaccurate statement that 'Grotius, perhaps happily, confused the Law of Nature and the Law of Nations (*ius gentium*).' Grotius was guilty of no such confusion.

H. L.

Cases on the Law of Tort. Third Edition. By. P. H. WINFIELD, K.C., F.B.A., LL.D. London: Sweet & Maxwell, Ltd. 1945. xi and 297 pp. (£1 net.)

It is a tribute to the deserved success of Professor Winfield's case book that the demand for it has made a third edition necessary when the second appeared in 1941.

Three new cases have been added: *Hay (or Bourhill) v. Young*; *Croftier Handwoven Harris Tweed Co. v. Veitch* (which replaces *Sorrell v. Smith*), and *Brackenburgh v. Spalding U. D. C.* The selection of cases is always a matter for nice discrimination, and Professor Winfield has practiced notable restraint in each edition. The readers for whom his book is designed will be grateful, for any teacher of law must be impressed by the obvious difficulty experienced by a number of pupils whose anxious industry in the solution of problems leads them to emphasize what is unhelpful at the expense of what is significant. Professor Winfield's unerring choice of vital cases, and the crucial passages to be extracted therefrom is not only of obviously direct assistance to the student of law, but should help to guide him in using the law reports for himself.

Not the least valuable part of this work is the succinct series of notes at the end of the cases, putting the enquiring reader on to cognate points. In this connexion a few small suggestions may possibly be made. Would some reference to *Gautret v. Egerton* be useful ('there must be something like fraud')? Does *Wilchick v. Marks* deserve a mention? Experience also seems to show that, however obvious it may be, it is often forgotten that negligence in creating a source of danger upon premises leads to liability quite independently of the occupation of those premises, and perhaps a reference to *Kimber v. Gas Light and Coke Co.* would prevent frequent misapplication of the law of dangerous structures. Would it also be possible to make brief references to involuntary bailees and, in connexion with nuisance, to *Robinson v. Kilvert*? These small suggestions are made with considerable diffidence as Professor Winfield has so great a flair for discarding the unessential.

R. P. F. R.

The Modern Law of Real Property. Fifth Edition. By G. C. CHESHIRE, M.A., D.C.L., of Lincoln's Inn, Barrister-at-Law, Fellow of Exeter College, Oxford. London: Butterworth & Co., Bell Yard. 1944. xliv and 878 pp. and Index. (35s. net.)

A new edition of 'Cheshire' has come at an appropriate time and we are glad to be able to state that the description on the title page is past history. It seems peculiarly fitting that as the first holder of the Vinerian Chair turned even Co. Litt. into the 'language of a gentleman' the latest holder of that chair should be he who has made the 1925 Property Legislation intelligible, so far as that is possible, to the present generation. We are sure that all property lawyers will agree with us that justice has been done, and as lawyers we can ask for no more.

The new edition follows familiar lines. The introductory part dealing with the 'simplification' of the law has been reorganized and in part rewritten with undoubted improvement. More attention has been paid to the modern cases on restrictive covenants, though we would respectfully suggest that the test for annexation to the land is not whether the covenantor vendor hopes to sell the land retained for a higher price, but whether the covenantor, whether or not he is a vendor (*Drake v. Gray* [1936] Ch. 451), desires to confer a benefit on the land and not on the covenantee. If the sole desire is to get a bigger price it is thought that the covenant would be personal: cf. *Re Sunnyside* [1932] 1 Ch. 79. The account of strict settlements has been removed from entailed interests to life interests. Here again we would respectfully suggest that a greater improvement would have been to move the settlement of the legal estate out of equitable interests with which it has little to do: cf. *Re Liberty's Will Trusts*, which does not appear to have been cited at all.

One of the great difficulties of property teachers is to make students see the true relation between settlements of the legal estate and beneficial interests in succession, whether under a trust for sale or strict settlement. The rule in *Re Abbott*, as now expounded, has been made as clear as it can be and so has the general principle relating to conditions void for uncertainty. This also applies to clogging the equity and priority of mortgages. The Limitation Act, 1939, has been duly dealt with, and so have new decisions since the last edition. All this is very satisfactory and matter for congratulation, but the book grows and for the purposes of students it is too large, notwithstanding that it practically ignores registration of title. May we respectfully suggest that the next edition be radically pruned and that, perhaps, some most obvious material is contained in statements of elementary conveyancing that bears little relation to the fundamental principles of real property.

H. P.

The Law of Property in Shakespeare and the Elizabethan Drama. By PAUL S. CLARKSON and CLYDE T. WARREN. Johns Hopkins Press. xxvii and 346 pp. (21s. 6d.)

I commend this book warmly to lovers of Shakespeare or of the law or, better still, of both. Much rubbish has been produced upon the myth of Shakespeare. The lawyer Malone planted it in 1778, Lord Campbell, in a letter to John Payne Collier, published in 1859, watered it, and the Baconian controversy gave it increase. J. M. Robertson—not a lawyer—did much to explode the myth in his *Baconian Heresy* in 1913 by examining the works of Shakespeare's contemporaries and showing that, if Shakespeare was a lawyer, many other Elizabethan dramatists were lawyers too, because they have the same habit of enriching their dialogue from the fruitful springs of legal ideas and vocabulary.

But this is not a book upon the now dead Baconian controversy, or a book written to propound or defend any particular thesis. The two authors, American lawyers,

have undertaken an elaborate examination of nearly three hundred Elizabethan plays, including Shakespeare's, for the purpose of extracting and elucidating the references to legal rules and institutions and the use made of legal ideas and vocabulary.

This extensive piece of work, of which this volume is the first fruits, has been systematically planned and is clearly being tackled with that practical directness of attack upon big problems that is characteristic of the best of American large-scale undertakings. This volume deals with Property, Real and Personal, including Descent, Distribution, Wills and Administration. Later volumes on Equity, Marriage and Divorce, Criminal Law, etc., are promised.

There is much in this book that cannot be neglected either by the amateur student or the expert commentator on the Elizabethan drama, and the lawyer who has any interest in the history of the law or his profession will derive much pleasure from it. What might easily have been a catalogue of words and phrases printed from a card index has been skilfully woven into a connected story. I cannot claim any special knowledge of the topics covered by this volume, but, unless I am greatly mistaken, the authors have acquired in the course of their study a reliable and practical knowledge of English legal history and are making a valuable use of it.

A. D. McN.

Supplement (Second) to Rayden's Practice and Law in the Divorce Division.

By F. C. OTTWAY, of the Probate and Divorce Registry. London: Butterworth & Co. (Publishers), Ltd., Bell Yard, Temple Bar. 1944. xi and 112 pp. (10s. 6d.)

Since the previous Supplement, the Matrimonial Causes Rules, 1944, revoking those of 1937, have been issued. This, in itself, would warrant a supplement, because, after all, the title of 'Rayden' is the *Practice and Law of the Divorce Division*, and the practice is nothing without the up-to-date rules. Nevertheless we wonder why it was thought necessary to reprint the whole of the Courts (Emergency Powers) Act and the Courts (Emergency Powers) Rules, including such forms as a Summons in Pending Action for Foreclosure or Sale in lieu of Foreclosure. Peculiar things may happen in the Divorce Division, but we doubt whether foreclosure is one of them.

This reviewer has consistently doubted the validity of Appendices of reprinted Acts and Rules and Orders. Most practitioners, if not all, have some place in which most Acts and even Rules and Orders are to be found. To encumber text-books with them is to increase the size and expense of text-books without corresponding advantage.

The format of Rayden makes the use of a Supplement particularly simple and effective. It is very simple to decide whether any fresh cases or statutes have affected the parent work and the brief statements of the cases decided since the last edition are easy to follow. What we do not understand is, the omission of *Acworth v. Acworth* [1943] P. 21 (reduction of maintenance); *Atkin v. Atkin* [1942] 2 All E. R. 657 (cruelty by persistent nagging of wife); *Easterbrook v. Easterbrook* [1944] P. 10 (jurisdiction in nullity); *Hays v. Hays* [1943] P. 55 (King's Proctor and expediting decrees absolute); *S. (otherwise B.) v. S.* [1944] 1 All E. R. 429 (nullity, alimony *pendente lite*); *Tickler v. Tickler* [1943] 1 All E. R. 5 (desertion, agreement to live apart); *W. (otherwise B.) v. W.* [1944] 1 All E. R. 446 (nullity, particulars on allegation of incapacity). To our mind the practice of issuing supplements to practitioner's digests can be justified only by the inclusion of all the relevant cases. This type of work rarely discusses the open points, therefore it is desirable to include all the decisions. At least this is our view, in which we distinguish the older fashioned type of work which is not a digest, but selective and discursive. Whether we are justified in this distinction we are not sure.

H. P.

Sutton and Shannon on Contracts. Third Edition. By RALPH SUTTON, M.A., One of His Majesty's Counsel, Reader in Common Law to the Council of Legal Education, and N. P. SHANNON, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd., Bell Yard, Temple Bar. 1944. lxvii and 427 pp. (15s.)

'Sutton and Shannon,' which began life in 1909 as Pease and Latter, has now passed through six editions in thirty-five years including two major wars. This is sufficient testimony to its popularity and its features, therefore, call for no description. Wisely the learned editors have decided against the incorporation of 'temporary' statutes such as Trading with the Enemy Act, but have performed a major operation on the subject of frustration. What formerly was dealt with in just over twenty pages, is written at the length of nearly forty pages and, if we may say so, well written. Whether an elementary book of 427 pages should devote so much to this topic is partly a matter of opinion, and partly, perhaps, an inevitable concomitant of war production. The Limitation Act, 1939, has necessitated re-writing on that subject.

Otherwise the learned editors seem to have devoted their attention to incorporating a selection of the recent cases since the last edition. We would not quarrel with the selection, but we do make the suggestion that for an elementary book the most recent authorities are desirable, but should be included by way of substitution and not of addition where possible. For example, consider pp. 37 and 38. Why should the facts of *Sugar v. L. M. S.* appear in the text and *Chapelon v. Barry U. D. C.* appear as an additional illustration and no existing case be at least remitted to being a name in a footnote? We should, however, add that the present additions to length are not large; the problem is primarily one of the future and we have no doubt that this edition will enjoy the popularity of its predecessors. We should like to congratulate the publishers on the format of the book and the price having regard to present difficult conditions.

H. P.

Matrimonial Causes. By S. SEUFFERT, of the Middle Temple and the South-Eastern Circuit, Barrister-at-Law. Second Edition. London: The Solicitors' Law Stationery Society, Ltd., 88—90, Chancery Lane, W.C.2. 1944. xvi and 102 pp. (10s. 6d. net.)

This work, which ran into three impressions for the first edition, was produced just after the passing of the Matrimonial Causes Act, 1937, as an annotated copy of the Act. It now appears with the notes enlarged and brought up to date and incorporating the new Matrimonial Causes Rules, 1944, and fragments of the Judicature Act, 1925, and other relevant enactments. Its original title was the Matrimonial Causes Act, 1937, and it may be that the change of title involves a slight change of vocation, namely, that it is to represent something like a text-book on matrimonial causes. It is, however, significant that of the 150 cases (roughly speaking) cited in the notes, something less than 50 belong to the period prior to 1937. While we recognise the drastic changes made in 1937, we do not think that the old cases have been so completely obliterated.

Momentous as it was, of course, the Act is a short one, but the commentary supplied on the basis mainly of the recent cases is excellent of the kind which briefly states the facts of the authorities. For example, the learned author remarks that there is no precise legal definition of adultery, and then having given a general description, proceeds to enumerate that it cannot be adultery if the wife is raped: *Clarkson v. Clarkson*, 46 T. L. R. 623; nor when the respondent was insane or incapable of

the act: *Yarrow v. Yarrow* [1892] P. 92, and so on to deal with evidence of adultery that is accepted.

Similarly, the learned author observes that there is no exact legal definition of desertion. He then goes on: 'Whether desertion without cause has existed for the necessary period must always be a question of fact and the determination must depend on the circumstances of each particular case: *Cohen v. Cohen* [1940] A. C. 631, at p. 645. Now *Cohen v. Cohen* was a very important case, but it turned upon whether the *continuance* of the desertion was without cause and not upon the issue whether desertion without cause had existed; that was clear and unambiguous but not so the learned author's treatment of the case. This is exceptional. The statements are clear and accurate as far as they go. For those who desire a commentary on the law of matrimonial causes tied to the new Act and rules with up-to-date cases (and we have noted no omissions among the recent cases), this is an excellent manual.

H. P.

Axis Rule in Occupied Europe. By RAPHAEL LEMKIN. Published for the Carnegie Endowment for International Peace by Columbia University Press. New York. 1944. 38 and 674 pp. (\$7.50.)

This imposing volume consists of an Introduction of 260 pages and of about 400 pages reproducing German and Italian statutes and decrees in the territories occupied by these States. In Part I of the Introduction, which is devoted to 'German techniques of occupation,' the author gives a critical and general survey of German administration, police, law, courts, treatment of property, finance, labour, the legal status of Jews, and of what he calls 'genocide'—a new term for the physical destruction of nations and ethnic groups. The survey is not merely informative. It contains some interesting and sound observations as, for instance, with regard to the responsibility of the special police for war crimes and the limits of the plea of superior orders. Part II gives a picture of the German administration in each of the countries occupied by Germany. Part III is the result of prodigious industry and ingenuity in procuring the required documentation. It will be invaluable to all those concerned with the liquidation of German legislation in Europe. It cannot be accurately said that the volume is a contribution to the law of belligerent occupation, for the German administration of occupied territories was in most respects contrary not only to the Hague Convention, but also to most elementary notions of customary international law on the subject. This fact does not diminish the value of the volume as a scholarly historical record. The Carnegie Endowment for International Peace have performed a notable service by making this work available to the student and the administrator in charge of occupied Germany.

H. L.

The Czechoslovak Cause. An Account of the Problems of International Law in relation to Czechoslovakia. By EDUARD TABORSKY. London: H. F. & G. Whiterly, Ltd. 1944. 158 pp.

The title of this monograph does not, perhaps, do justice to its usefulness as a contribution to some interesting questions of International Law. This applies in particular to the chapters on the recognition of the Czechoslovak National Committee and on the provisional and, eventually, the full recognition of the Czechoslovak Government in London by Great Britain and other States. That recognition was based on the assumption, which is legally unimpeachable, that there was a legal continuity between the Czechoslovak State as it existed prior to German acts of

violence in 1938 and 1929 and that represented by the Government in exile under the leadership of the last freely functioning President of the Republic. In this respect the Government of Czechoslovakia in London was in the same position as the other Governments in exile. Dr. Taborsky discusses the relevant aspects of recognition with learning and restraint. There is a valuable chapter on Czechoslovak jurisdiction abroad—a matter which the author elaborates in detail by reference to the *Amand* cases, the unreported but interesting *Navratil* case and the activity of its military courts. Even in those chapters in which he discusses the Munich and Vienna arbitrations which dismembered his country and the German-Hungarian invasion, he avoids any appearance of special pleading and confines himself to the legal aspects of the problems involved. The monograph ends with a lucid account of the various international instruments concerned with the participation of Czechoslovakia in the new international order.

H. L.

The Linguistic and Historical Value of the Irish Law Tracts. By D. A. BINCHY. The Sir John Rhys Memorial Lecture. British Academy. 1943. Humphrey Milford. (4s.)

‘Irish law preserves in semi-fossilized condition many primitive “Indo-European” institutions of which only faint traces survive in other legal systems derived from the same source.’ ‘The customary law which the Goidelic conquerors brought with them to Ireland was “Indo-European” in basis and origin. How far it had already been modified by external influences, such as racial admixture, is a question too difficult to be discussed here; but at all events it had retained the principal institutions found in the early records of Hindu, Greek, Roman, Germanic, and Slavonic law.’

These two extracts give some idea of the scope of ancient Irish law. Only in very recent years has it been searched by competent scholars. Welsh law was more fortunate in its students, but it would be better to study the two systems together; and we suggest that Scots Gaelic and Manx Gaelic may give further enlightenment. Irish law was primitive; it never came under the direct influence of Roman Law; and the Irish people were too conservative to let Christianity alter their laws. The written tracts date from the seventh century; the oral tradition dates from remote antiquity; and, incidentally, is still carried on in our time by the traditional tales at the fireside, usually passed on inaccurately. There are ancient legal maxims from the law schools; leading cases from the ancient courts; the legal language used by the jurists so as to keep the trade in their hands—a Gaelic within Gaelic. We can trace many interesting developments; such as an emancipation of the married woman into freedom of independent contract and ownership of property. There are many things of interest to lawyers; but there is also much to be learned of early social life and customs; tribal economics; and the tracts are a mine for the grammarian and the philologist.

There is much spade work to be done, says our author. The preliminary study necessary to qualify as a gardener of this sort is terrific; and it is not so easy to get even an elementary knowledge of Old, Middle, and Modern Gaelic—and the tracts require all three—as it is of Greek, Latin, or Hebrew. This job requires a Gaelic Maitland, with a couple of dozen highly qualified assistants to do the spade work. Dr. Binchy has started very well, long may he continue. Most of us are incapable of such research, so we must hopefully await ‘A History of Irish Law.’

H. O'B.

The New Law of Education. By D. J. BEATTIE, LL.M., Solicitor of the Supreme Court, Town Clerk, and Chief Education Officer of Penzance, and P. S. TAYLOR, M.A., Education Officer of Chatham. London: Butterworth & Co. (Publishers), Ltd. 1944. xx, 229 and Index, 39 pp. (21s. net.)

The Education Act, 1944, is entitled, 'An Act to reform the law relating to Education in England and Wales.' It is one of the most important Acts of this long living Parliament, creating a single national system where hitherto there had been a variety of services. It received the Royal Assent on August 3rd, it contains 122 sections and 9 schedules. This comprehensive handbook was published in October, a tremendous feat on the part of the editors and publishers. Mr. Evan T. Davies of the Middle Temple, Barrister-at-Law, director of Education for West Sussex, and former member of the Consultative Committee of the Board of Education, in his foreword points out that the Act is necessarily complicated for its effects fundamental changes. Former books on the subject are rendered obsolete. This book will enable all who are responsible for, or interested in the administration of, education to become familiar with the detailed application of the Act. It is a clear exposition of the Act in relation to the old law in as concise a form as possible. The introduction of eighty pages is an excellent outline of the system before the Act, the main changes made by it, the new Statutory System of education—sub-divided into education authorities, the obligation to provide and receive education, religious education and further education; medical and special services, independent schools, finance, transition from the old to the new, and education in Wales. It gives a complete picture of the entire subject with references to sections of the Act; about 210 pages are devoted to the text of the Act with full annotations and cross references. This is followed by a comprehensive index of 39 pages. It should prove invaluable, an admirable handbook.

T. E. L.

Anglo - American Legal Bibliographies. An annotated guide. By WILLIAM L. FRIEND. Law Library, Library of Congress, Washington, 1944. United States Government Printing Office. xii, 139 and Index, 26 pp. (\$1.50.) (Obtainable from Superintendent of Documents, Washington, D.C.)

This work has been published as a memorial to the late Law Librarian of Congress, Dr. John T. Vance. It is an annotated guide to Anglo-American legal bibliographical materials, including the more noted library and publishers' catalogues, but excluding works devoted exclusively to American statutory material. The author and title arrangement is followed throughout and a comprehensive index enables any subject-matter to be turned up with ease. The first chapter of thirty-seven pages is a complete and up-to-date history of the development of Anglo-American legal bibliography starting with the classified catalogue of one Thomas Bassett, 1671—a bookseller near Clifford's Inn, and David Hoffman's Course of Legal Study, 1817, in Baltimore. It is surprising that so little has been done to this end in England. Chapter II which is the bibliography proper contains 298 entries with a detailed bibliographical analysis under each entry, and a reference is given to the Library of Congress catalogue cards to denote the different editions of each bibliography. The work fulfils a long felt need, it will find a place in every law library. We congratulate Mr. Friend and his staff on a very fine piece of work.

T. E. L.

A History of the English Courts. By A. T. CARTER, C.B.E., K.C. Being a Seventh Edition of 'A History of Legal Institutions.' London: Butterworth & Co. (Publishers), Ltd. 1944. viii and 183 pp. (21s. net.)

A student's book that has run to its seventh edition in forty-five years is too well-established to call for a detailed review. The preface of the previous edition is repeated and the total number of pages is the same. At p. 77 the Statute of Westminster (undated), *Moore v. A.-G. for the Irish Free State* (1935) and *British Coal Corporation v. R.* (1935) are recorded, and at pp. 110—11 the substance of the Supreme Court of Judicature (Amendment) Act, 1944, is given. Some recent statutes extending the Jurisdiction of the County Court are given at p. 142, but in line 13, £200 should be substituted for £100. It would be more useful to the student if statutes were cited by some method other than the regnal year.

Transactions of the Grotius Society. Vol. 29 : Problems of Peace and War. Papers read before the Society in the year 1943. London: Longmans, Green & Co., Ltd. 1944. 170 pp. (15s.)

Transactions of the Grotius Society, Vol. 30 International Law Conference, London, 1944. London: Longmans, Green & Co., Ltd. 1944. 141 pp. (Price not stated.)

These two volumes contain a particularly valuable collection of papers and reports of discussions of questions of current interest in International Law which should be carefully studied by all who take an interest in the developments of the subject following on the war. There are two contributions by Sir Arnold McNair, which will be welcomed as models of clear thinking and exposition, 'The Need for the Wider Teaching of International Law' and 'International Law in Municipal Courts.' Dr. Ernst Wolff (formerly of Berlin) discusses a topic of immediate practical interest in 'Municipal Courts of Justice in Enemy Occupied Territory.' Certain important matters in connection with Conflict of Laws are dealt with by Prof. Gutteridge and Dr. K. Lipstein. Prof. Lauterpacht contributes a paper which should take a high place among scholarly material for the study of Jurisprudence, 'The Idea of Natural Rights in Legal and Political Thought.' There are other useful papers by Dr. V. R. Idelson, Dr. C. J. Colombos, Dr. F. A. Mann, and Dr. F. N. Keen, and reports of addresses by the President, Sir Cecil Hurst, K.C., and Viscount Finlay.

D. T. O.

Elements of the Law of Torts. By A. RAYMOND BLACKBURN, LL.B., Solicitor of the Supreme Court, and EDWARD F. GEORGE, LL.B., Solicitor of the Supreme Court. London: Sweet & Maxwell, Ltd. xvi and 271 pp. (15s. net.)

We agree with the reasons given by the authors for writing a new book on the law of torts, and reassure them that they have handsomely fulfilled the objects they set out to achieve. They have skilfully navigated in the surging swells of the sea of torts, and steered a middle course 'between an exhaustive completeness . . . and the grim simplicity of a cram-book.' They have produced a sound and interesting introductory book containing a clear statement of essential principles well illustrated with cases, and have explained, where necessary, e.g., pp. 40 (e) and 76, technical terms from other branches of the law. The meaning of tort is well discussed with sufficient emphasis on the historical background. A judicious

choice has been made of old established and very recent cases. At p. 84 (*ll*) *Hazeltine* should read *Hazeldine*; p. 130, lines 17—19, with reference to *Rylands v. Fletcher*, the engineer or contractor was found to be negligent, but this was not held to be material to the decision. At p. 210, line 33, for 5 read 6; p. 231, for £350 substitute £420.

T. E. L.

Wilshire's Common Law, Vol. I and Vol. II. Fifth Edition. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn, and the Western Circuit; Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1944. xxxii and 475 pp.; xxii and 352 pp. (£1 : 17s. 6d. the two volumes.)

The first volume deals with the principles of contracts, torts and evidence, and the second with mercantile contracts; the sections on hire-purchase and credit sales and the chapter on arbitration written by Mr. Bertram Jacobs are new. The book has been thoroughly revised and brought up to date, many sections have been re-written, and every chapter bears evidence of careful and skilful editing. It has a practical touch, and common lawyers of all grades, particularly candidates for the Solicitors' Final will find it extremely useful. Notable features are, that the student's attention is drawn to cases reviewing previous authorities, and the substance of recent cases is incorporated in the text. We note the following points: Vol. I, p. 106, for *Handley* read *Hindley*; p. 334 (*n*), for *Hamilton* read *Haseldine*; p. 444, line 22, for thirty substitute twenty (Evidence Act, 1939, s. 4); Vol. II, p. 74, line 22, non-manual workers whose remuneration exceeds £400 should be altered to £420; p. 145, line 22, add after *lien* 'on a ring,' and note that the divisional court was reversed on appeal, but too late for inclusion in the book—*Marsh v. Commissioners of Police* [1945] 1 K. B. 43.

T. E. L.

The Outlook for International Law. By J. L. BRIERLY. London: Humphrey Milford (Oxford University Press). 1944. 142 pp. (6s.)

This small volume deserves a close study, for it combines a lucid method of presentation with great learning and sober judgment. But since it is intended to serve as a guide for those charged with building the international organization of the future, and since it attempts to state broad principles based upon past experience, it is likely to raise many controversies. For this reason, a short summary of the author's conclusions, restricted to those of a more constructive character, appears preferable to a critical discussion of individual aspects.

The primary function of International Law is the delimitation of competences, not the regulation of international life and the establishment of world government. Although the existence of vital interests must be recognized, States should not be permitted to define their own interests for themselves. A system of security or special solutions for separate regions (not regional systems) or special functional organs may help to create peaceful conditions. The primary object must be good arms, followed by good laws and a stimulation of community feeling between nations. Article XI of the Covenant was a great step forward, but unconditional surrender of the right to go to war cannot be achieved. In the absence of world federation or of a central government, collective security is the best step towards world order, but in order to avoid disappointment security commitments should be adapted to vital interests and the obligations graded.

Professor Brierly believes that the outlook for the community of nations is not without hope, but at the gates to the New World international lawyers are reminded that it is only a continuation of the old.

K. L.

A Supplement to Beale's Bibliography of Early English Law Books.
Compiled for the Ames Foundation by ROBERT BOWIE ANDERSON.
Cambridge, Massachusetts: Harvard University Press. 1943.
ix and 50 pp. (14s. net.)

Mr. Anderson, the Associate Librarian of the Harvard Law School, has increased the value of the late Professor Joseph Beale's book by this addition to it. One of the many links of personal friendship that the writer of this notice had with Professor Beale was a common interest in the subject of his book, and it is a constant pleasure to recall many a conversation in the Harvard Law School Library on the treasures, printed and unprinted, there.

The Supplement consists of two parts. Part I contains detailed descriptions of books in the Library which are different from those given by Beale. In Part II there is a list of variations between the titles of the books in Beale's work and their titles in the copies owned by the Library. These discrepancies may be due to his having seen different copies or perhaps, in some cases, to printers' errors.

We are grateful to the Ames Foundation and to the learned compiler of the Supplement for a piece of work which must have involved a great deal of exacting labour.

P. H. W.

The Canadian Law of Copyright. By HAROLD G. FOX, K.C., M.A., LL.B.,
B.C.L., Ph.D. University of Toronto Press, Toronto. 1944. lxiv
and 770 pp. (\$18.50.)

The learned author tells us that, although the first statute dealing with copyright in Canada dates as far back as 1832, there has hitherto been no monograph on the Canadian law on this subject. He is to be congratulated on having filled this gap in legal literature in a way which, to a reviewer who confesses complete ignorance of Canadian law on the topic, seems admirable. The current Canadian Act reproduces for the most part our Copyright Act, 1911, but there are important differences between the two statutes, and thus the book is of considerable assistance to all who are interested in the study of Comparative Law, as well as to practitioners on both sides of the Atlantic. Canada has adhered to the Berne Convention (including its revisions), and so authors, artists and composers in the Dominion have full protection for their works in all the countries of the International Copyright Union, without the necessity of performing any formality.

Of especial interest is the discussion (pp. 403, *seq.*) of the question whether copyright can exist in broadcasting by radio. Dr. Fox gives this problem much fuller consideration than is to be found in the leading English monograph, and he examines the decisions in detail, including the judgment of the Judicial Committee in *Mellor v. Australian Broadcasting Commission* [1940] A. C. 491.

For the next edition, we suggest the inclusion of 'R. S. C.' in the list of abbreviations which are explained at the beginning of the book. For Canadian readers, no interpretation is needed, but English lawyers commonly associate 'R. S. C.' with 'Rules of the Supreme Court' instead of with 'Revised Statutes of Canada.'

P. H. W.

Argument from Roman Law in Political Thought, 1200—1600. By MYRON PIPER GILMORE. Harvard Historical Monographs XV. Cambridge, Mass.: Harvard University Press; London: Humphrey Milford (Oxford University Press). 1941. 148 pp. (\$2.00; 11s. 6d.)

The Emperor Henry VI asked Azo and Lothair 'Who has *merum imperium*?' Lothair said 'You alone,' and was given a horse; Azo, 'Both you and other magistrates,' and was praised by posterity. There are two or three relevant sentences in Justinian's Digest, and from them a great series of political thinkers purported to construct theories explaining in elaborate detail how the constitutional practice of their own day obeyed or disobeyed the universally valid precepts of imperial Rome. An ignorant reviewer must be grateful to Mr. Gilmore for his efforts to find and blaze a trail through the works of Accursius, Bartolus, Budaeus, Alciatus, Cujas, Zasius, Dumoulin, Gillot, Lorient, Govéa, Le Duaren, Baro, Charondas, Barclay (a sensible Scot who lived from 1546 to 1608), Bodin, Loyseau and others. Few of them knew much Roman law—Bodin on *legis actio* would get no marks even in the Bar examination—and we cannot hope to learn much about them from 148 short pages. Two facts stand out clearly: every theorist found it both necessary and possible to adduce Ulpian in support of his own opinions; and those opinions were in fact always partly derived from earlier interpretations of what Ulpian was thought to have said.

Maitland's name is not in the bibliography.

P. W. D.

The Modern Prison System of India. A Report to the Department. The Progress of Prison Reform in India during the Twenty Years following the publication of the Report of the 1919—20 Jails Committee. By Lt.-Col. F. A. BARKER, C.I.E., O.B.E., I.M.S. (Rd.). London: Macmillan & Co. 1944. xvi and 139 pp. (10s. 6d. net.)

This is volume III of the series, English Studies in Criminal Science, promoted by the Department of Criminal Science, Faculty of Law University of Cambridge, and is an expert's account of the results of the recommendations of the Indian Jails Committee of 1919—20. Not the least of the services rendered to India by the officers of the I.M.S. in Civil employ has been their wise and sympathetic control of jail administration. Colonel Barker is one of that distinguished band, with nearly thirty years' practical experience of jail conditions, and he tells us in straightforward terms what has been done, and what are the obstacles to more being done on the Committee's report. Overcrowding is one of the principal obstacles. It is scarcely a seemly advertisement of India's political advancement to spend large sums on prison buildings. Yet those who disturb the peace under the guise of political agitation must be put somewhere, where they can be kept quiet, and, so long as overcrowding continues, the problem of the contamination of the amateur by association with the professional criminal must remain. Nevertheless progress has been made, and Colonel Barker's description of it, and of the people affected by it, is most instructive of Indian conditions. Among the passages which may give the reader food for thought is one last sentence of one of the chapters: 'Penal and Prison Reformers owe the Salvation Army a deep debt of gratitude.'

A. C.

A Rationale of Criminal Negligence. By ROY MORELAND, S.J.D., Professor of Law, University of Kentucky. University of Kentucky Press. 1944. viii and 175 pp. (\$2.25.)

This book is published under a grant from the Haggin Trust and thus affords one more illustration of the generous support given in the U.S.A. to promote the academic investigation of legal topics. It is divided into four parts and an appendix. The first part is a short historical introduction; the second a discussion of the nature and quality of criminally negligent conduct, and the third an account of legislation in various States on the subjects of 'negligent murder,' 'negligent manslaughter' and 'negligent homicide' much of which illustrates the obscurity and confusion caused in modern times by a failure to achieve a clear analysis of the mental processes contemplated by the ancient doctrine of *mens rea* during its journey through the centuries to the present day. The fourth part consists of the author's conclusion, which is that criminal negligence, except in the case of murder, is objective and not subjective, but that a special degree of negligence is requisite for criminal liability; in fact, that 'civil and criminal negligence are the same in kind, differing only in degree.'

While strongly holding that this conclusion is not true as a statement of the common law of England (although it may describe correctly the effect of some American State legislation) it is yet possible for a reviewer to welcome the present book as a contribution to the study of a topic in which English jurisprudence is at its weakest. Professor Moreland has collected and discussed material which must be considered by anyone who desires an improvement in this most unsatisfactory section of our criminal law.

J. W. C. T.

The Conveyancers' Year Book, 1944. By Sir H. ELPHINSTONE, of Lincoln's Inn, Barrister-at-Law. Vol. 5. The Solicitors' Law Stationery Society, Ltd. London. 1944. xlv and 288 pp. (25s. net.)

This digest of cases, statutes, orders and regulations for the year 1943 is an invaluable and reliable guide and commentary. It is designed for the practitioner, everything has been done to simplify the task of turning up any point, witness the tables of Cumulative Contents, Vols. 1—5, Statutes, Cases and Rules and the comprehensive index to Volumes 4 and 5. The subject-matter is arranged in alphabetical order under some sixty-five main headings, and references are given for noting up in the precedent books and standard text-books. The substance of important articles in practitioners' and academic journals is given, often with fresh suggestions. At p. 163 there is a note on an attempt at marriage by proxy. Facility of reference, comprehensiveness and accuracy are the outstanding merits of this work.

T. E. L.

The Task of Law. By ROSCOE POUND. Franklin and Marshall College, Lancaster Pennsylvania. 1944. 94 pp. (\$1.50.)

Why Law? What is Law? and what can be done through Law? Here are some basic problems of jurisprudence, and in that order Professor Pound summarises in a simplified form the views he has expressed in his previous prolific publications. He rejects, among many others, the idealist's view of law. 'Free individual self-assertion . . . and ordered, even regimented co-operation, are both agencies of civilization.' Neither can be ignored or repressed (p. 36). Force has to be directed to maintain a balance between 'aggressive self-assertion and the co-operative social instinct of men' (p. 59). Rules based on reason and tested by experience are the permanent

elements of the law. 'Law is experience organized and developed by reason, authoritatively promulgated by the lawmaking or law-declaring organs of a politically organized society and backed by the force of that society' (p. 62). He finally deals with the theories of enforcement of law, and the practical limits of effective legal action. Every student of jurisprudence will have some of his difficulties solved by reading Professor Pound's book, will certainly find it stimulating and refreshing, and will be convinced that some of the old and extreme theories cannot be maintained.

T. E. L.

English Courts of Law. By H. G. HANBURY, D.C.L. Home University Library, London: Oxford University Press. 1944. 192 pp. (3s. 6d. net.)

Chapters II to VII covering some one hundred and twenty pages are an excellent account of the history of the courts from the *Curia Regis* to the Judicature Acts. They are accurate, well-balanced and attractively written. The eighth chapter of twenty pages deals with the courts as they exist to-day, the ninth chapter in twenty pages covers the place of the judges in the constitution, and the final chapter of seven pages deals with solicitors and barristers to-day. Chapter I on the content of the law marks the boundaries of law and morals; of contract, tort and crime, but Austinian theories of law and sovereignty will not be easy for the layman. The present title of the book is not an accurate guide to its contents, but everyone will be amply rewarded by reading it.

Bowstead on Agency. Tenth Edition. By His Honour Judge A. H. FORBES. London: Sweet & Maxwell, Ltd. 1944. xc and 336 pp. (35s. net.)

This excellent work requires no introduction, for it is to be found on every lawyer's bookshelf.

Judge Forbes has not altered its character or scope, with the result that it 'remains, what it always was, a book for practitioners.'

There is a vast amount of what might compendiously be termed academic exposition on this branch of the law, and so it is hoped that Judge Forbes will undertake the Herculean task of collating this with Bowstead's work when research is no longer hindered by 'bombed libraries and restricted travel.'

It must be noted that three cases, decided since 1938, and reported in the *Lloyds' List Reports* only, have not been included in this book. [*Ahlers v. Broome and Green*, 62 Ll. L. Rep. 163; *Sanday & Co. v. Maatschappij, etc., Ondernemingen N. V.* (C. A.) 65 Ll. L. Rep. 148; *Wessely v. Rosenberg, Loewe & Co.*, 67 Ll. L. Rep. 16.] While not denying their comparative unimportance, it is felt that to omit even a reference to them in a work of this kind cannot be entirely justified.

The reviewer feels also that the text of Article 67 might properly have been wholly recast so as to take better account of the important points brought out by the House of Lords in *Luzor (Eastbourne), Ltd. v. Cooper* [1941] A. C. 108.

J. D. H.

Powers and Duties Attributed to the League of Nations by International Treaties. Prepared by the Secretariat of the League of Nations. Geneva. 1944. 48 pp. (2s. 6d.)

As the Acting Secretary-General of the League of Nations points out in his Preface, the purpose of this publication—which is more than a bare catalogue—is to draw attention to the cases in which the liquidation of the League would leave various functions relating to or forming part of the operation of treaties and agreements without an organ competent to perform them. These functions refer not only to the implementation of some of the provisions of the Treaty of Versailles. They cover a variety of subjects such as international bureaux placed under the direction of the League, conventions dealing with the traffic in dangerous drugs, the protection of minorities, the regime of the Straits, and so on. The memorandum has been edited by Mr. McKinnon Wood with his customary care.

The Law of Partnership. By J. ANDREW STRAHAN and NORMAN H. OLDHAM. Sixth Edition, by H. G. HANBURY, D.C.L., Fellow of Lincoln College, Oxford; Lecturer at Oriel College, Oxford; of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1944. xvi and 141 pp. (12s. 6d. net.)

Although any statement on the Law of Partnership must, to a large extent, constitute a commentary on the Partnership Act, 1890, Strahan avoids alike the Scylla of pure and simple commentary and the Charybdis of an exposition unrelated to the Act. The result is, for the student, a most useful propaedeutic to Partnership Law.

The present edition differs little from the 5th edition published in 1927. There seems to be little justification in dropping the excellent tetralogy of precedents contained in Appendix II of the last edition, and the learned editor's assertion that 'note has been taken of all cases decided since the last edition' cannot, unfortunately, be taken seriously.

In view of the egregious prominence played by income tax in the life of present day society, the reviewer feels that in future editions a chapter on 'Income-Tax Law in relation to Partnership' would be a decidedly valuable addition.

L. L. R.

The Problem of Statelessness. By P. WEIS, Dr.Jur., and R. GRAUPNER, LL.B. British Section of the World Jewish Congress, 55, New Cavendish Street, London, W.1. 1944. 40 pp. (2s.)

The authors of this useful pamphlet have attempted to set out the main causes of statelessness and to suggest measures which should preclude a further increase in the number of persons affected by this evil. Dr. Weis examines the causes of statelessness in general. This part of the pamphlet is valuable for its information regarding the relevant legislation of the Axis powers during the present war. Mr. Graupner discusses statelessness as a consequence of the change of sovereignty over territory after the last war. His well-informed and sober, if terrifying, account deserves to be read by all those interested in the problem of the settlement of populations after the present war.

K. L.

How to Reform Parliament. By ROBERT S. W. POLLARD. London: The Forum Press. 1944. 48 pp. (2s. net.)

No proposals for the reform of parliamentary procedure will be equally accepted to all three political parties, but whatever the reader's creed may be, he will be wiser after reading this stimulating essay. Mr. Pollard has done a real service here, he has produced it at the right moment and we thoroughly recommend it.

Looking Ahead: Administration of Justice. Report of Conservative Sub-Committee on Reforms in the Administration of Justice. Published by Post-War Problems Committee, Conservative and Unionist Party Organisation, 24, Old Queen Street, Westminster. 1945. 34 pp. (6d. net.)

Contains proposals for reforms in the legal system, cheaper justice and a criticism of magistrates courts.

Public Administration. Vol. XXII, No. 2. 1944. 18, Ashley Place, Victoria, London. (4s. net.) *Tribunals for Conscientious Objectors and Administrative Law* (pp. 95—104). By ROBERT S. W. POLLARD.

A detailed analysis of their working and a vindication of the principles suggested by Dr. Robson in *Justice and Administrative Law*, pp. 315—27. Lawyers and politicians should stop tilting at 'bureaucracy,' and co-operate with the Civil Service in making Administrative Law a proper instrument for giving justice to the people with whom it deals.

Introduction to Economics. By ALEC CAIRNCROSS, Ph.D. (Cantab.), Lecturer in Political Economy, University of London and Glasgow. London: Butterworth & Co. (Publishers), Ltd. 1944. vi and 430 pp. 1944. (12s. 6d. net.)

Although primarily designed for the commercial student, the lawyer will gain much useful information here on the Basic Conceptions of Economics, Structure of Industry, Supply and Demand, Distribution of Income, International Trade, Money and Banking, the State and the Economic Order.

The Law Journal. A Review of the University Students Law Society, Vol. I, No. 1. October, 1944. Royal University of Malta.

We welcome the first number of the Law Journal from this gallant island, long may it flourish. *Inter arma silent leges* does not apply to this proud bastion of the Empire. Its 'memorandum and articles' are made clear in an interesting editorial. Leading articles are Re-establishment of Self Government, by Sir George Borg; Foreseen and Unforeseen Damages, by Paul Mallia; The Importance of the Legal Profession, by Mr. Justice Ganado; Unneutral Service, by E. Busuttill; Duties of Lawyers, by Mr. Justice Harding, and the 'report' of two Moots.

Revista Juridica de la Universidad de Puerto Rico. Nos. 1, 2, 3 and 4. Vol. XIII. 1943. (\$3.00 per annum.)

Informacion Juridica. Servicio de la Comision de Legislacion Extranjera del Ministerio de Justicia, February Nos. 25, 27, 28, 33, 1944. Madrid.

Contemporary Law Pamphlets. Series 5, No. 5. New York University School of Law, 1942. International Protection of Axis Victims and Revindication of their Property Rights. By E. DE HOFMANNSTHAL and R. BERGER.

Papers in Legal Philosophy. Reprinted from the Proceedings of the American Catholic Philosophical Association. 19th Annual Meeting, Chicago, Dec. 1943. Presented through the Committee on Philosophy of Law and Government.

Contains articles on current Philosophical Problems in Legal Education, by F. J. Rooney. Implications of the New Code of Canon Law for Legal Philosophy, by Miriam Theresa Rooney.

Temple University Law Quarterly. Nos. 2 and 3. Vol. XVIII. 1944. Philadelphia. (\$2.00 a year.)

Leading articles are Rights and Duties of Bailor and Bailee in Pennsylvania, by M. H. Brown; Status of the American State, by C. S. Lobingier; Disposition of Surplus War Property, by J. H. La Brum; Legislative Apportionment and the Law, by C. W. Shull.

Defence Regulation 1AA : Analysis and Criticism. By D. N. PRITT, K.C., M.P. National Council for Civil Liberties, 11a, King's Road, London, S.W.2. 22 pp. (6d. net.)

Popular Government. Vol. 10. No. 9. December, 1944. Published monthly by the Institute of Government. University of North Carolina. (\$2.00 a year.)

Revista de Estudios Politicos. Vols. 5, 6, 7 and 8. 1943—44. Vol. 9. 1944. Publicacion Bimestral del Instituto de Estudios Politicos. (10 pesetas.) Also *Suplemento de Informacion Economica.* Nos. 1, 3 and 4. 1943. Madrid. *Guerra y Revolucion.* By Professor E. H. CARR. *Cambio de Estructura del Derecho Internacional.* By Dr. CARL SCHMEDT. *San Vicente Ferrer en la Politica de su Tiempo.* By V. GENOVES.

Symposium in Honour of the Sixtieth Birthday of Dr. Edvard Benes, President of the Czechoslovak Republic (May 28th, 1944). Published by the Association of Czechoslovak Advocates Abroad with the assistance of the Educational Department of the Czechoslovak Ministry of the Interior in London. Edited by Dr. EGON SCHWELB. Obtainable at the offices of the Association, 43/4, Warrington Crescent, London, W.9, or at "Czechoslovak," 71, Edgware Road, W.C.2. (4s.)

To be reviewed in the next issue.

Also received:—

New Zealand and the Statute of Westminster. By A. E. CURRIE. Wellington (N.Z.): Butterworth & Co. (Aus.), Ltd. 1944. 43 pp. (3s. 6d.)

Considers the effect of the proposed adoption of the Statute of Westminster by New Zealand.